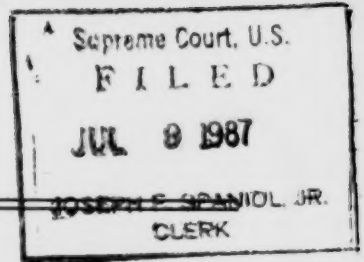


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No. ....



In The  
**Supreme Court of the United States**  
October Term, 1986

— 0 —  
Katherine B. NICHOLS, etc.,

*Petitioners,*

v.

Don RYSAVY, *et al.*,

*Respondents.*

(See List of Parties)

— 0 —  
**PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT**

— 0 —  
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July 1987

1380



## QUESTIONS PRESENTED

Purporting to act pursuant to the Burke Act, 25 U.S.C. § 349, the Secretary of the Interior, between 1917 and 1920, issued thousands of fee patents to Indian allottees prior to the expiration of the allotment trust period. These fee patents were issued without applications therefore by the allottees and without a determination of each allottee's competency to manage his or her own affairs. Thousands of Indians lost their allotments to third parties because they were not in fact competent to manage their own affairs.

Is the United States an indispensable party to an action pursuant to 25 U.S.C. § 345 to recover an allotment from third parties?

Is a fee patent forced on an allottee without individually determining the allottee's competency to manage his or her own affairs void as beyond the authority granted to the Secretary of the Interior by the Burke Act, 25 U.S.C. § 349?

Does either 28 U.S.C. § 2401(a) or 25 U.S.C. § 347 bar these actions to recover allotments?

### List of Parties

Katherine B. NICHOLS, etc., Petitioners,	Mary H. PRITZKAU, etc., Petitioners,
v. Don RYSAVY, et al., Respondents,	v. Helen LARSON, et al., Respondents,
Clover POTTER, etc., Petitioners,	Elsie BONSER, etc., Petitioners,
v. STATE OF SOUTH DAKOTA, et al., Respondents,	v. Ruth SHELBOURN, et al., Respondents,
Glays ECOFFEY, etc., Petitioners,	Anna Rose LAPOINTE, etc., Petitioners,
v. WASHABAUGH COUNTY, et al., Respondents,	v. C. & M. McCORMICK, et al., Respondents,
Rosemond GOINS, etc., Petitioners,	Duane R. SANOVIA, etc., Petitioners,
v. Nick ASSMAN, et al., Respondents,	v. Leslie HANCOCK, et al., Respondents,
Lois Emery FALLIS, etc., Petitioners,	Mary Louise BORDEAUX, etc., Petitioners,
v. G. W. HOLMES, et al., Respondents,	v. Henry HORN, et al., Respondents,
Shirley Lee BORDEAUX, etc., Petitioners,	Marceline HASTINGS, etc. Petitioners,
v. Mary Ann HUNT, et al., Respondents,	v. PLATTE VALLEY & INVESTMENT CO., et al., Respondents,
Mary PRITZKAU, etc., Petitioners,	Marceline HASTINGS, etc., Petitioners,
v. COTTONWOOD RANCH & LIVESTOCK CO., et al., Respondents,	v. Frank MASSA, et al., Respondents.

(Full list of parties appears at Appendix pages 3-6.)



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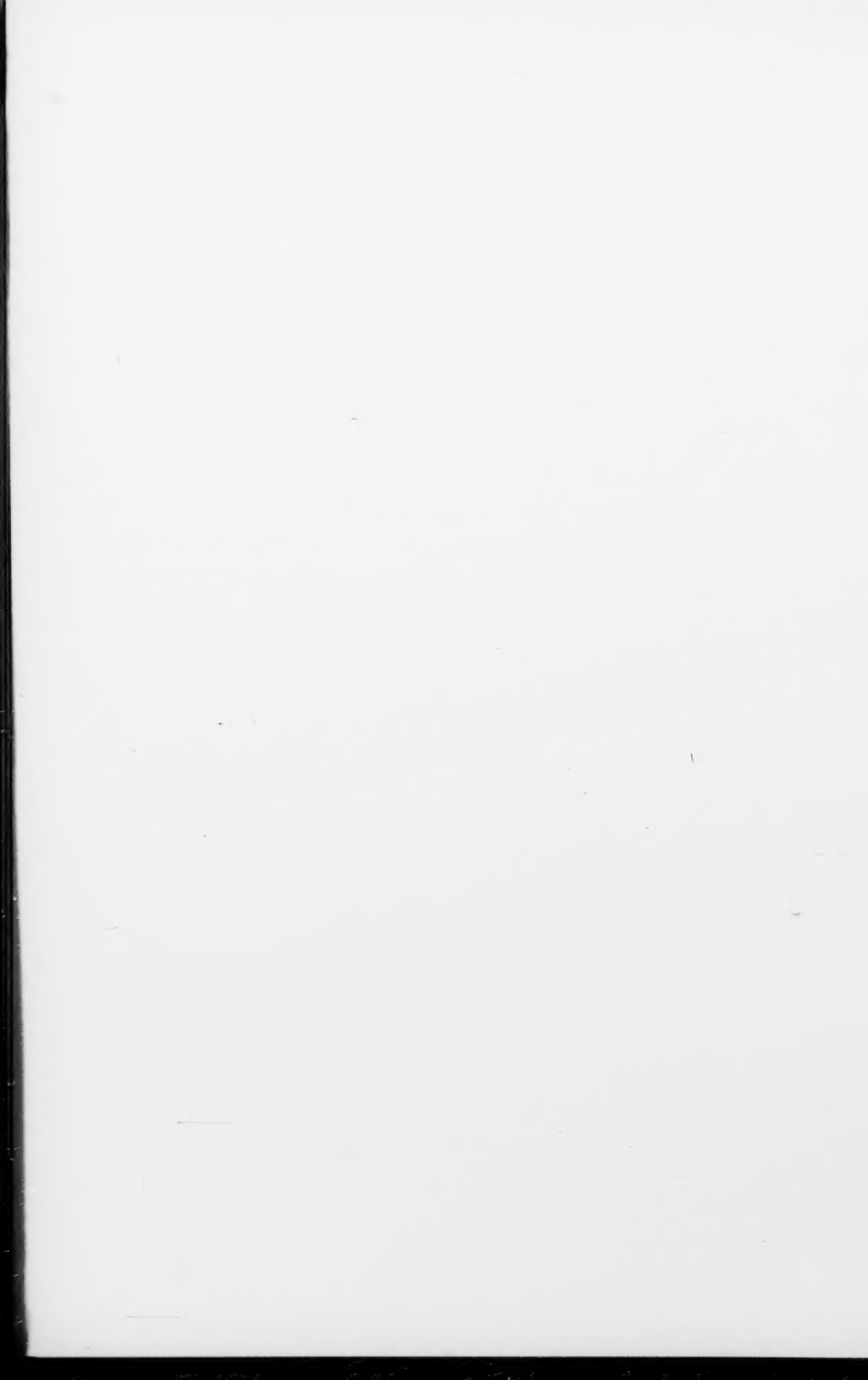
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**PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
EIGHTH CIRCUIT**

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceedings on January 15, 1987.

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**OPINIONS BELOW**

The opinion of the Court of Appeals for the Eighth Circuit is reported at 809 F.2d 1317 (8th Cir. 1987), *reh'g denied*, — F.2d — (February 25, 1987). The judgment appears at Appendix p. 2 and the opinion is reprinted at Appendix pp. 3-40. The appeal consolidated fourteen cases from the central and western districts of South Dakota.

The opinion of the United States District Court for the Western District of South Dakota in the consolidated cases of *Nichols v. Rysavy*, *Potter v. South Dakota*, and *Ecoffey v. Washabaugh County* are published at 610 F. Supp. 1245 (D.S.D. 1985) and reprinted here at Appendix pp. 41-60. The opinion of the United States District Court for the Central District of South Dakota in the case of *Bordeaux v. Hunt* is published at 621 F. Supp. 637 (D.S.D. 1985) and is reprinted at Appendix pp. 61-107. This decision controlled the remaining unpublished cases from the Central District of South Dakota which were consolidated in the Eighth Circuit appeal, e.g., *Goins v. Assman*, No. 82-3079; *Fallis v. Holmes*, No. 85-5445; *Pritzkau v. Cottonwood Ranch & Livestock*, No. 82-3082; *Pritzkau v. Larson*, No. 82-3083; *Bonser v. Shelbourn*, No. 82-3084; *Lapointe v. C. & M. McCormick*, No. 83-3030; *Sanovia v. Handcock*, No. 83-3036; *Bordeaux v. Horn*, No. 83-3048; *Hastings v.*

*Platte Valley and Investment*, No. 83-3067; and *Hastings v. Massa*, No. 84-3002.

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## JURISDICTION

The petitioners invoked the jurisdiction of the district courts pursuant to 25 U.S.C. § 345 and 28 U.S.C. § 1331. The Court of Appeals assumed *arguendo* that jurisdiction existed under 25 U.S.C. § 345. On May 10, 1985, the District Court for the Western District of South Dakota granted Respondents' motion to dismiss in *Nichols v. Rysavy*, *Potter v. South Dakota*, and *Ecoffey v. Washa- baugh County* based on the sovereign immunity of the United States, the statute of limitations in 28 U.S.C. § 2401(a), the indispensability of the United States as a party and failure to state a claim.

On November 14, 1985, the District Court for the Central District of South Dakota granted Respondents' motions for summary judgment on the merits in the cases before it and also adopted the grounds relied upon by the district court in *Nichols v. Rysavy*.

On Petitioners' consolidated appeal, the Eighth Circuit Court of Appeals on January 15, 1987 entered a judgment and opinion holding that the statute of limitations in 28 U.S.C. § 2401(a) barred these actions against the United States and that the United States was an indispensable party whose absence required dismissal as to all parties. The court also stated that the statute of limitations in 25 U.S.C. § 347 is a possible source of limitation on petitioners' claims.

A timely petition for rehearing was filed on January 29, 1987 and was denied on February 25, 1987 (Appendix



p. 1). The petition was originally due on May 26, 1987. On May 20, 1987, Justice Blackmun issued an order extending the time for filing a petition through July 10, 1987.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. § 1254(1).

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## STATUTES INVOLVED

### § 345. *Actions for allotments*

All persons who are in whole or in part of Indian blood or descent . . . who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, . . .

### 25 U.S.C. § 347. *Limitations of action for lands patented in severalty under treaties*

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary

of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situated shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others ~~than~~ members of any tribe of Indians.

Burke Act, 25 U.S.C. 349. *Patents in fee to allottees*

. . . *Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent. . . .

28 U.S.C. 2401. *Time for commencing action against United States*

(a) Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. . . .

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## STATEMENT OF THE CASE

These are "forced fee" cases brought by Sioux Indians to recover interests in lands allotted to individual Indians from tribal land pursuant to the policy expressed in the General Allotment Act of 1887, 24 Stat. 388, (Dawes

Act).<sup>1</sup> The policy of the Dawes Act was applied to the Sioux Indians by the Act of March 2, 1889, 25 Stat. 888, which broke up the Great Sioux Reservation into several smaller reservations and implemented the allotment policy within each reservation. The Sioux Allotment Act provided for allotments of 320 acres to each head of family and lesser amounts to other categories of Indians. 25 Stat. 890, § 8. The Secretary of the Interior was authorized to negotiate with the tribes for the purchase of "surplus" lands remaining after allotment. 25 Stat. 892, § 12.<sup>2</sup> "In order to protect the allottees from the improvident disposition of their lands to white settlers, the Sioux allotment statute provided that the lands were to be held in trust by the United States." *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076, 2078 (1987), 25 Stat. 891, § 11.<sup>3</sup> At the expira-

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<sup>1</sup> Forced fee patents are fee patents issued to allottees prior to expiration of the trust period. They are known as "forced fees" because they were issued without the allottees' application therefore. The effect of a validly issued fee patent was to terminate the trust. Petitioners maintain that the forced fee patents challenged in these suits were void and did not terminate the trust.

<sup>2</sup> At the time the Dawes Act was passed, Indian land holdings amounted to approximately 138 million acres. Between 1887 and the passage of the Indian Reorganization Act, 25 U.S.C. §§ 461 et seq., in 1934, that area was reduced to approximately 48 million acres. Sixty million acres were sold or ceded as "surplus." F. Cohen, *Handbook of Federal Indian Law*, (2d ed. 1982) at 138.

<sup>3</sup> In negotiations with the Indians over the terms of the Sioux Allotment Act, the Indians were told:

And if you take your land in severalty a deed is given to you by the Great Father, and he holds it in trust for you for twenty-five years, so that you cannot be traded or

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tion of the trust period, a fee patent was to be issued to the allottee, "free of all charge or incumbrance whatsoever." 25 Stat. 891, § 11. The President was given discretion to extend the trust period and did so. *Id.* Congress extended it indefinitely in 1934. 25 U.S.C. § 462. During the period of the trust, any lease, conveyance, or contract touching the land was "absolutely null and void." 25 Stat. 891, § 11. The land could not be sold, mortgaged or taxed. The purpose of the trust period was to provide protection to allottees during their adjustment to the dominant society. *United States v. Mitchell*, 445 U.S. 535, 544 n.5 (1980).

The Sioux Allotment Act provided that "each and every allottee . . . shall be entitled to all the rights and privileges and be subject to all the provisions of section six" of the Dawes Act, 25 Stat. 891, § 11. Congress amended section six of the Dawes Act by passage of the Burke Act in 1906, 34 Stat. 182 (codified at 25 U.S.C. § 349). The Burke Act contains the language central to this case:

. . .

*Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, in-

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cheated out of it, so that it will remain for you and your children and your children's children.

(Gen. Warner at Pine Ridge Agency, Dakota, June 15, 1889). Senate Executive Document No. 51, 51st Cong., 1st Sess. (1890) cited in *Irving v. Clark*, 758 F.2d 1260, 1266, fn. 10 (8th Cir. 1985), *aff'd* *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076 (1987).

cumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent.

...

This language shifted the responsibility of issuing fee patents from Congress to the Secretary of the Interior. App. p. 10.

From 1906 to 1916, the Secretary of the Interior granted fee patents only to allottees who applied for them and were found competent. In 1916, Secretary of the Interior Franklin K. Lane began a new policy of seeking out competent Indians and issuing fee patents to them whether they had applied for them or not. App. p. 11. This became known as the "forced fee patent" policy. On April 17, 1917, Commissioner Cato Sells issued "A Declaration of Policy" which provided that competency commissions were from that time to investigate only allottees of one-half or more Indian blood. Allottees of less than one-half Indian blood were presumed competent and received fee patents without application or other investigation into their competency. App. p. 12. In 1919, the presumption of competence was extended to adult allottees of one-half Indian blood. App. p. 13.

The policy was disastrous for allottees. As the Court of Appeals noted below, "Thousands of Indians in the western United States received forced fee patents, with primarily harsh results." App. p. 13. Quoting from Judge Porter's opinion in *Bordeaux v. Hunt*:

Abuses were rampant: It is clear from the historical evidence \* \* \* that many patents were issued to Indians obviously incapable of taking on the burdens of unrestricted property ownership in the midst of a

more sophisticated white society. It is clear that some holders of these patents were cheated out of their land by speculators and merchants, and that some land was lost when the Indians sold or mortgaged it for money to pay state property taxes, taxes which could not be legally assessed under the rule of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

*Id.* In 1921, "[t]he policy of issuing patents in fee to Indians of one-half or less Indian blood without further proof of competency was discontinued." 1921 Annual Report of the Secretary of the Interior at p. 54.

The Petitioners have sued to recover allotments lost through sale or foreclosure after receiving fee patents pursuant to the forced fee patent blood quantum policy. Their theory is that applications for fee patents and individual determinations of competency were prerequisites to the existence of the Secretary's authority to issue fee patents. Since the Secretary did not comply with these prerequisites, the issuance of the fee patents was void *ab initio* and the land is still subject to the federal trust. All subsequent transfers by the allottees were void. The present occupants of the land were sued as was the United States.

The Court of Appeals held that the statute of limitations contained in 28 U.S.C. § 2401(a) barred these actions against the United States and that the United States was an indispensable party without whose presence the cases could not proceed. App. pp. 8, 22 and 34-39. The Court also stated that 25 U.S.C. § 347 is a possible source of limitation on Petitioners' claims. App. p. 8 and pp. 33-34. Finally, the Court held that the forced fee patents were not void since the Secretary had the general power

to issue them. In the court's view, they were at most, voidable. App. pp. 28-30.<sup>4</sup>

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## REASONS FOR GRANTING THE WRIT

### I. THE DECISION OF THE EIGHTH CIRCUIT DEPRIVES THOUSANDS OF INDIANS OF THE ABILITY TO PROTECT THEIR TRUST PROPERTY

The forced fee policy represents one of the most disgraceful chapters in the history of federal Indian policy. Indians are now seeking to rectify some of the injustices suffered as a result of that illegal policy. The impetus for this action on the part of Indians came from the federal government, which identified thousands of forced fee claims and notified the Indians of them.<sup>5</sup>

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<sup>4</sup> The Court stated that its decision rested on purely procedural grounds and did not reach the legality of the forced fee patents. Nevertheless, the Court, in reaching its decision, did reject Petitioners' claim that the Secretary's actions were void.

<sup>5</sup> The history of how the government came to do this is set out in *Covelo Indian Community v. Watt*, 551 F. Supp. 366 (D.D.C. 1982). Briefly, the federal government became concerned that 28 U.S.C. § 2415, which was enacted in 1966 to provide a statute of limitations for certain claims brought by the United States, might be construed to apply to claims which the United States could bring on behalf of Indians. An extension of the statute as to those claims was sought and obtained. Meanwhile, a massive effort to identify any such claims was undertaken. Because of the number of claims, additional extensions were granted in 1977 and 1980. Thousands of forced fee claims were identified, and Indians were notified of them. Because of federal complicity, these cases were viewed as inappropriate for suit by the federal government. Thus, Congress provided in the 1980 extensions for the submission of legisla-

(Continued on following page)



Pursuant to the Indian Claims Limitation Act of 1982, 96 Stat. 1976-1978, lists of potential tribal and individual claims against third parties have been published in the *Federal Register*. See *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). Thousands of claims are specifically identified as forced fee patent claims and are directly affected by the Eighth Circuit's decision in these cases. See 48 *Fed. Reg.* 51204-51268 (Nov. 7, 1983) and 48 *Fed. Reg.* 13697-13920 (March 31, 1983). Forced fee patent claims are listed from states located in the Seventh, Eighth, Ninth and Tenth federal circuits. It is impossible to state with certainty how many acres of land were lost to Indians because of the forced fee patent policy, but more than one million acres and thousands of Indians are likely affected.<sup>6</sup>

The Eighth Circuit opinion backhandedly validates the federal government's illegal actions. The Court of Appeals purported to dispose of the cases below on purely procedural grounds. App. p. 8. Nevertheless, in its determination that the statute of limitations contained in 28

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tive solutions as to those claims not appropriate for litigation. When it became apparent that the government was not going to comply with this requirement, the *Cove/o* litigation was filed and a lobbying effort mounted to obtain a further extension. The result was the Indian Claims Limitation Act of 1982, 96 Stat. 1976-1978, which required lists of claims to be published in the *Federal Register* and provided varying statutes of limitation depending on the action taken by the federal government in relation to a particular claim or class of claims.

<sup>6</sup> Fee patents were issued for over 2.4 million acres of trust land from 1917-1920, the period the policy was in effect. 1920 Annual Report of the Commissioner of Indian Affairs (ARCIA), p. 172. The vast majority were forced fee patents issued pursuant to the 1917 Declaration of Policy. Estimates have been made that two-thirds of allottees issued fees were unable to hold on to their land. 1921 ARCIA at p. 25.



U.S.C. § 2401(a) applied to this action, the Court rejected the argument that the statute never started to run because the land was still held in trust. The Court of Appeals had held in *Mottaz v. United States*, 753 F.2d 71 (8th Cir. 1985), *rev'd on other grounds*, 476 U.S. —, 106 S.Ct. 2224 (1986), that so long as the land continued to be held in trust the statute of limitations would not run. The Court below held that the land here was no longer in trust because the Secretary's actions made the fees, at most, voidable.

The holding below that the United States is an indispensable party extends far beyond forced fee cases. The decision destroys the majority of claims under the Indian Claims Limitation Act of 1982 which were intended to give the Indians one last chance to bring their claims.<sup>7</sup> *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). In addition, the opinion below establishes a rule which devastates the ability of Indians nationwide to protect their trust interests.

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<sup>7</sup> Cf. *United States v. Mottaz*, 476 U.S. —, 106 S.Ct. 2224 (1986). *Mottaz* involved a transfer of an allotment without the consent of all the owners as required by 25 U.S.C. § 483. Most secretarial transfers presumably ended up in the possession of parties other than the United States and would not be barred by the statute of limitations which proved fatal in *Mottaz*, but will be barred by the decision below. Other cases potentially affected by the Court of Appeals' decision are rights of way and other trespass cases. Many of the claims listed pursuant to the Indian Claims Limitation Act of 1982 are secretarial transfers, rights of way or trespass cases. See also *Navajo Tribe of Indians v. State of New Mexico*, 809 F.2d 1455, 1471-73 (10th Cir. 1987) (United States an indispensable party to an action to recover lands from third parties where Indian and federal interests are not aligned).

## II. THE DECISION BELOW IS ERRONEOUS AND CONFLICTS IN PRINCIPLE WITH DECISIONS OF THIS COURT

### A. The United States Is Not An Indispensable Party

1. *The Decision Below Conflicts In Principle With Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968) and *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076 (1987)

In holding that the United States is an indispensable party to these actions to recover interests in allotments, the Court of Appeals did not even mention *Poafpybitty v. Skelly Oil Co.*, 390 U.S. 365 (1968). In that case, this Court held that allottees had standing to bring an action for breach of an oil and gas lease. The United States did not have to bring the suit. In speaking of the allotment system's objectives of safeguarding Indian land while at the same time preparing the Indians to take their place in modern society, this Court stated: "This dual purpose of the allotment system would be frustrated unless both the Indian and the United States were empowered to seek judicial relief to protect the allotment." 390 U.S. at 369.

This observation is nowhere more pertinent than in the forced fee context, where the federal government will not bring these cases on behalf of Indians in large part because of its own "serious problem of complicity . . . in bringing about many improper transfers and encumbrances of Indian land . . ." See *Covelo Indian Community v. Watt*, 551 F. Supp. 366, 382 (D.D.C. 1982) See also S. Rep. 96-569, 96th Cong., 2d Sess. 3 (1980). There is no reasonable expectation that the federal government will ever bring these cases. The only hope for protection of the allotments lies with the Indians themselves.

In this Court's recent opinion in *Hodel v. Irving*, — U.S. —, 107 S.Ct. 2076 (1987), the Court held that heirs to interests in allotments made under the Sioux Allotment Act had standing to bring decedents' claims where the Secretary of the Interior could "hardly be expected to assert appellees' decedents' rights" to the extent they turned on a claim that a federal statute was unconstitutional. 55 U.S.L.W. at 4655.

The Court of Appeals failed to give controlling weight to the policy of protecting allotments that *Poafpybitty* and *Hodel* require. While it recognized the availability of a forum as one of the factors expressed in *Provident Bank and Trust Co. v. Patterson*, 390 U.S. 102 (1968), as being relevant to a determination of indispensability, App. p. 37, it gave controlling weight to the interests of the party defendants, the United States, and the public interest.<sup>8</sup> App. 37-40. The "interests" that the Court found controlling do not warrant such weight.<sup>9</sup> The Court mentioned but did not discuss the defendants' "wish to avoid multiple

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<sup>8</sup> As to the public interest, the Court of Appeals was concerned that "[i]f these fee patents can be successfully attacked, the entire United States' title system is in jeopardy." App. p. 39. This concern is misplaced. The fee patents involved here are not grants from the public domain. *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919). The land was once aboriginal land of the Sioux. Then it became reservation land, and then allotted land. The fee patent, when properly issued, terminates the trust. No non-Indian interest in these cases trace back to an original grant of a fee patent from the United States to a non-Indian. And no third party is attacking the patent—the grantee is attacking it. That the fee patents here may be attacked has no relevance to whether a grant of land from the United States may be generally attacked.

<sup>9</sup> The Court purportedly viewed the interests of the party defendants and the United States as intermeshed. But in fact, the Court discussed only factors dealing with the United States.

litigation, inconsistent relief, or sole responsibility for liability he shares with another." App. p. 37. As noted previously, the United States has refused to bring these cases on behalf of allottees; therefore, there is no danger of multiple litigation or inconsistent relief. As for the nonfederal defendants' desire to share liability with the United States, that surely cannot override the protection of allotments provided for in the General Allotment and Sioux Allotment Acts, and recognized by this Court in *Poafpybitty* and *Hodel*. Defendants have not pointed to any right to indemnity from the United States. *Poafpybitty* does not allow the Court of Appeals' implicit assumption that if someone has to suffer, it may as well be the Indians.

The Court had two main concerns about the United States. First, the Court felt that without the presence of the United States it would be inappropriate to find that the United States held the land in trust. Second, it felt it would be inappropriate to try the government's liability behind its back. App. pp. 37-38. Both these concerns are misplaced.

Assuming *arguendo* that 25 U.S.C. § 345 is not itself a sufficient answer to the Court of Appeals' concern, *Heckman v. United States*, 224 U.S. 413 (1912) is.<sup>10</sup> *Heckman*,

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<sup>10</sup> In *Heckman*, the lands involved were not held in trust, but were subject to restrictions against alienation. For present purposes, that difference is not material. This Court in *United States v. Mitchell*, 445 U.S. 535 (1980) held that the purpose of trust status of allotted lands was simply to ensure nontaxibility and to prevent alienation. 445 U.S. at 544. No active management duties were thereby placed on the United States. 445 U.S. at 546. Thus, the trust here serves the same function as the restraint on alienation in *Heckman* and a finding that the lands here are still held in trust would result in no more burden

(discussed extensively in *Poafpybitty*) involved a suit by the United States to cancel certain conveyances of allotted lands made by members of the Cherokee Nation. Some 16,000 defendants and some 30,000 conveyances by members of the Five Civilized tribes were ultimately to be affected. The contention was that the conveyances were in violation of existing restrictions upon the power of alienation. This Court upheld the right of the United States to maintain suits on behalf of the allottees but specifically noted that the government could either bring the necessary suit itself or allow the litigation to be prosecuted by the Indian. *Heckman*, 224 U.S. at 446.<sup>11</sup>

The Eighth Circuit itself acknowledged that actions under 25 U.S.C. § 345 which result in a finding that land is held in trust by the United States can be brought without

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(Continued from previous page)

on the federal government than the finding that the lands in *Heckman* were still subject to a restraint on alienation. The trust here would also serve the same function as protection of aboriginal title through applicability of the Nonintercourse Act, 1 Stat. 137. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The United States was not a party to the *Oneida* case. And yet, at times, the protection afforded by the Nonintercourse Act can give rise to federal obligations. *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975).

<sup>11</sup> "Later decisions followed the implications of *Heckman* and held that the right of the United States to institute a suit to protect the allotment did not diminish the Indian's right to sue on his own behalf." *Poafpybitty v. Skelly Oil Co.*, 390 U.S. at 370. *Citing Creek Nation v. United States*, 318 U.S. 629 (1943); *Skokomish Indian Tribe v. France*, 269 F.2d 555 (9th Cir. 1959); *Salder v. Public National Bank and Trust Co.*, 172 F.2d 870, 874 (10th Cir. 1949); and *Brown v. Anderson*, 61 Okla. 136, 160 P. 724 (1916). See also *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251, 1254 (9th Cir. 1983), *cert. denied*, U.S. 1049, *reh'g denied*, 466 U.S. 954 (United States not an indispensable party and collecting cases).

joining the United States, *citing Vicenti v. United States*, 470 F.2d 845 (10th Cir. 1972), *cert. dismissed*, 414 U.S. 1057 (1973) and *Begay v. Albers*, 721 F.2d 1274 (10th Cir. 1983). App. p. 38. The distinguishing feature here, as the Court saw it, was the potential liability of the United States. But the United States will not be bound by any finding of wrongdoing. *Provident Bank and Trust Co. v. Patterson*, 390 U.S. at 114. Furthermore, the United States would have available to it all of its normal defenses against the third parties.

2. *25 U.S.C. § 345 Indicates That The United States Is Not An Indispensable Party To An Action To Recover An Allotment*

This Court in *United States v. Mottaz*, 476 U.S. —, 106 S.Ct. 2224 (1986), held that 25 U.S.C. § 345 provides jurisdiction over actions seeking the issuance of an allotment in the first instance and actions involving claims to already existing allotments. 106 S.Ct. at 2231, App. pp. 17-20. In the first type of suit, the United States is required to be joined, "while as to the latter class of cases, no mention of United States' participation is made." *Id.* To hold that the United States must be joined in all cases under § 345 would restrict access to federal court afforded Indians raising claims involving their land entitlements. *Id.* at n.9.

Furthermore, this Court noted that the remedial clause of 25 U.S.C. § 345 "provides that a judgment in favor of an Indian 'claimant' shall have the same effect . . . as if such allotment had been allowed and approved by [the Secretary of the Interior].'" 106 S.Ct. at 2232. This is so even where the United States is not a party. *Id.* at



n.9. This answers any concern about declaring land to be held in trust in the absence of the United States. There is no indication in 25 U.S.C. § 345 that the United States need be joined in an action to recover an allotment.

**B. The Burke Act Did Not Authorize The Secretary Of The Interior To Issue Fee Patents To Allottees Without Application Therefore And Without Making Individual Determinations Of Competency**

The Secretary forced thousands of fee patents on allottees based on a presumption that they were competent. Petitioners argued below that the Secretary's authority to issue fee patents pursuant to the Burke Act was conditioned upon receipt of an allottee's application for a fee patent and upon making an individual determination of the allottee's competency. If either condition was not fulfilled, authority was lacking, the issuance of the patents was void, and the lands are still held in trust. The Court of Appeals held that the Burke Act, 25 U.S.C. § 349, empowered the Secretary to issue the fee patents; therefore the lands were no longer in trust. App. p. 30. "Because the fee patents at issue were not void, but possibly voidable, they were not the "nullity" that appellants propose . . ." *Id.* The Court's interpretation is inconsistent with the language, legislative history and contemporaneous administrative interpretation of the Burke Act.

While there is no specific requirement in the statute for an application, Congress had never issued fee patents without them and all Congress was doing under the Burke Act was transferring its task to the Secretary. App. p. 10. Nor did the Secretary issue fee patents to allottees absent an application during the first ten years of the Burke Act. App. p. 11.

As to determinations of competency, the Act provides that the Secretary "... is authorized whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs ... to cause to be issued to such allottee a patent in fee simple." The existence of the authority is conditioned upon a case-by-case determination, and not upon a mere presumption of competency. The Eighth Circuit had itself placed this natural reading on the Act in earlier cases. *Baker v. United States*, 276 F. 283 (8th Cir. 1921); *United States v. Debell*, 227 F. 760 (8th Cir. 1915). In *Baker*, a criminal prosecution for conspiracy to defraud the United States in respect of its trust duties to certain Indians and their allotted lands, the Court of Appeals read the Act as authorizing the Secretary of the Interior "to issue patents in fee in individual cases in which he was satisfied that the Indians were competent and capable of managing their own affairs." 276 F. at 284.

And in *United States v. Debell*, an opinion issued prior to the Secretary's Declaration of Policy, the Court of Appeals had interpreted the Burke Act as establishing a very stringent test of the competency of the allottee.

It is indispensable to that competency and capability to manage his affairs which conditions the right of the Secretary to issue a patent in fee simple to an Indian under the first proviso of section 6 in chapter 2348, 34 Stat. 182, 183, that he shall have at least sufficient ability, knowledge, experience, and judgment to enable him to conduct the negotiations for the sale of his land and to care for, manage, invest, and dispose of its proceeds with such a reasonable degree of prudence and wisdom as will be likely to prevent him from losing the benefit of his property or its proceeds.



227 F. at 770. Such a comprehensive determination of competency is inconsistent with any approach other than a case-by-case determination. *Cf. Bordeaux v. Hunt*, App. pp. 88-90.

The case-by-case approach is also the only approach consistent with the legislative history. The legislative history is clear that the purpose of the Act was to transfer responsibility for issuing fee patents from Congress to "the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs." H.R. Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906). App. p. 11. The House Report contains a copy of a letter from Indian Commissioner Leupp stating that the "bill makes it the duty of the Secretary . . . to satisfy himself of the civic competency of the allottee concerned. Through [his officers] the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant." *Id.* at p. 4. Thus, the Burke Act was intended to lessen the chance of an incompetent Indian being issued a fee patent and thereby losing his or her allotment.

The Secretary was not authorized to adopt the broad-scale approach of using blood quantum as an indicator of competency. All of the patents issued pursuant to that policy were unauthorized and therefore void *ab initio*. Because of the importance of the interpretation of the Burke Act to thousands of allottees and the dubious interpretation by the Court of Appeals, this Court should grant *certiorari*.

**C. Neither 28 U.S.C. § 2401(a) Nor 25 U.S.C. § 347 Bar This Action**

1. *28 U.S.C. § 2401(a) Does Not Apply Here*

28 U.S.C. § 2401(a) derives from former § 41(20) of Title 28 of the 1940 Code which was the same in the 1926 Code and in the 1911 Code where it originated. 36 Stat. 1093, Part 1 (1911). None of these prior code sections could possibly have been read to limit actions by Indians concerning their right to allotments. In 1948, the United States Code was revised. The Reviser's Notes to 28 U.S.C. § 2401(a) state that § 2401 "[c]onsolidates the provision in section 41(20) [the predecessor to § 2401(a)] of Title 28 U.S.C., 1940 ed., as to time limitation for bringing contract actions against the United States with section 942 [torts time limitation] of said Title 28." H. Rep. No. 308, 80th Cong. 1st Sess. p. A185 (1947); note also published at 28 U.S.C.A. § 2401.

In the 1948 revision, there was no intent to apply a statute of limitations where it had not applied before. And any intent to diminish special Indian rights must be clearly expressed. *Squire v. Capoeman*, 351 U.S. 1 (1956). *Morton v. Mancari*, 417 U.S. 535 (1974). Here, to apply 28 U.S.C. § 2401 would also be inconsistent with the Indian Claims Limitation Act of 1982, 96 Stat. 1976 (1982). As this Court stated in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985):

In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of the Indians.

. . .

Congress [thus] intended to give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf. Thus, we think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations.

2. *25 U.S.C. § 347 Is Inapplicable By Its Terms*

The Eighth Circuit Court of Appeals' opinion noted 25 U.S.C. § 347 as a "potential source of limitation on appellants' claims," App. p. 8, and as "a possible independent source of limitation." App. pp. 33-34. Assuming *arguendo*, it was a basis of the Court's opinion it is erroneous. The Act by its terms applies only to lands allotted under treaty. The allotments here were all issued under the Act of 1889. Also, it only applies to lands where a deed has been approved by the Secretary of the Interior. None of the deeds to non-Indians here were approved by the Secretary of the Interior. The Court of Appeals offers no basis whatsoever for its conclusion that 25 U.S.C. § 347 applies.

## CONCLUSION

These cases present issues of great importance. The Eighth Circuit Court of Appeals resolved these issues erroneously, to the great detriment of Indian people to protect their property. This Court should grant *certiorari* to review the Eighth Circuit's decision.

Dated this 9th day of July, 1987.

Respectfully submitted,

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Native American Rights Fund  
1506 Broadway  
Boulder, CO 80302  
(303) 447-8760

*Counsel for Petitioners*

App. 1

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

Nos. 85-5234/5432/5445/86-5034  
5035/5036/5037/5038/5039  
5040/5041/5042-SD

Katherine B. Nichols, etc.,  
et al.,

Appellants,

vs.

Don Rysavy, et al.,

Appellees.

\*  
\* Appeals from the  
\* United States District  
\* Court for the District  
\* of South Dakota  
\*  
\*  
\*  
\*  
\*

Appellants' petition for rehearing en banc has been  
considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

February 25, 1987

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain

Clerk, United States Court of Appeals, Eighth Circuit

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UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

JUDGMENT

Nos. 85-5234/5432/5445/86-5034/5035/5036/5037/5038/  
5039/5040/5041/5042

Katherine B. Nichols, etc.,  
et al.,

Appellants,

v.

Don Rysavy, et al.,

Appellees.

\*  
\* Appeals and Cross-  
\* Appeals from the  
\* United States District  
\* Court for the District  
\* of South Dakota.  
\*  
\* (Filed January  
\* 15, 1987)  
\*

These appeals from the United States District Court were submitted on the record of the said district court, briefs of the parties and were argued by counsel.

Upon consideration of the premises, it is hereby ordered and adjudged that the judgment of the district court is affirmed in accordance with the opinion of this Court.

January 15, 1987

(SEAL)

A true copy.

ATTEST:

/s/ Robert D. St. Vrain  
Clerk, U.S. COURT OF  
APPEALS, EIGHTH CIRCUIT

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App. 3

Katherine B. NICHOLS, Individually and as Special Administratrix of the Estate of Amelia Huston Nichols No. 593, Deceased, Appellant.

v.

Don RYSAVY, Margaret Rysavy, Raymond DeMers, Leo Novotny, Raymont DeMers, Geraldine DeMers, Doris Rysavy, Estates of W. & A. Rysavy, J. Rysavy, James Rysavy, William Rysavy, Amelia Rysavy, the United States of America, Hon. Donald P. Hodel as United States Secretary of the Interior, Ken Smith as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Clover POTTER, Individually and as the Special Administratrix of the Estate of James Wilde, Appellant,

v.

STATE OF SOUTH DAKOTA, United States of America, Donald P. Hodel as U.S. Secretary of the Interior, Ken Smith as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Gladys ECOFFEY, Individually and as Special Administratrix of the Estate of John Yellow Bird, Appellant,

v.

WASHABAUGH COUNTY, United States of America, Donald P. Hodel as U.S. Secretary of the Interior, Ken Smith as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Chicago Title Insurance Company, First American Title Insurance Company, Lawyers Title Insurance Corporation, Safeco Title Insurance Company of Idaho, Stewart Title Guaranty Company, Ticor Title Insurance Company, Title Insurance Company of Minnesota, Transamerica Title Insurance Company, USLIFE Title Insurance Company of America, Amici Curiae For Appellees.

Rosemond GOINS, Individually and as Special Administratrix of the Estate of Ida Huston Roubideaux, Appellants,

v.

Nick ASSMAN, Edwin Assman, W.O. Assman, William Assman, Isabelle Assman, Dorothy Assman, Donald Assman, Clarence Assman, Sadie Assman, Joe Assman, Esther Assman, Assman Realty, the United States of America, Honorable James Watt, as United States Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Lois Emery FALLIS, Individually and on behalf of the Heirs, Devisees, Benefactors and Assigns of Robert Emery, deceased, Appellant,

v.

G.W. HOLMES and Delores Holmes, United States of America, Honorable William Horn, United States Secretary of the Interior and Ross Swimmer, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Shirley Lee BORDEAUX, Individually and as Special Administratrix of the Estate of Clara Hudson, No. 3196, deceased, Appellant,

v.

Mary Ann HUNT, Estate of Lyle T. Hunt; Alvina Woockmann, The United States of America: Honorable Donald Hodel, as United States Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Mary PRITZKAU, Individually and as Special Administratrix of the Estate of Narcisse Rich, Allotment No. 1163, Deceased, Appellant,

v.

COTTONWOOD RANCH & LIVESTOCK CO., Charles Steen, Vera Steen, Louis Buduhl, Chester Buduhl, the United States of America, Honorable Donald Hodel, as



App. 5

Secretary of the Interior; Ken Smith, Secretary of the Interior for Indian Affairs, Tri-County Water Association, Appellees.

MARY H. PRITZKAU, Individually and as Special Administratrix of the Estate of Julia Narcelle, Appellant,

v.

Helen LARSON, Estate of Clifford Larson; Ziebach County, The United States of America, Honorable Donald Hodel, as United States Secretary of the Interior; and Ken Smith, Assistant Secretary of the Interior for Indian Affairs, Appellees.

Elsie BONSER, Individually and as Estate Administratrix of the Estate of Mattie J. Bonser, No. 142½, Deceased, Appellant,

v.

Ruth SHELBOURN; Julius Wahl; Dorothy Wahl; Todd County Independent School District; Joseph Shelbourn; Floyd Reagle; Ethelena Reagle; The United States of America; Honorable Donald Hodel, as United States Secretary of the Interior and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Anna Rose LAPOINTE, Individually and as Special Administratrix of the Estate of Lena Lima Bourdeaux, Appellant,

v.

C. & M. McCORMICK; Mary Abdellah; Charles McCormick; Will Maggrett; United States of America; Honorable Donald Hodel, as United States Secretary of the Interior and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Duane R. SANOVIA, Individually and as Special Administrator of the Estate of James Sanovia, Deceased, Appellant,

v.

Leslie HANDCOCK, Thelma Handcock, Mae Handcock, Estate of M.D. Handcock, United States of America;

App. 6

Donald Hodel, Secretary of the Interior; Ken Smith, Assistant Secretary of the Interior for Indian Affairs, Appellees.

Mary Louise BORDEAUX, Individually and as Special Administratrix of the Estate of Clementine Hudson, Appellant,

v.

Henry HORN, Marion Horn, Elmer Horn, Estate of A. Horn, Anna Horn, United States of America; Honorable Donald Hodel, as Secretary of the Interior; Ken Smith, Assistant Secretary of the Interior for Indian Affairs, Appellees.

Marceline HASTINGS, Individually, and as Special Administratrix of the Estate of Frank McCloskey, Deceased, Appellant,

v.

PLATTE VALLEY AND INVESTMENT CO.; Earl Hollenbeck; Vincent Hollenbeck; V. Hollenbeck; The United States of America; Honorable Donald Hodel, as United States Secretary of the Interior and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

Marceline HASTINGS, Individually and as Special Administrator of the Estate of Mary Pure Blacksmith, Deceased, Appellants,

v.

Frank MASSA, Esther Massa, Guisto Massa, Maria Massa, Charlotte Abrams, a/k/a C. Cherniak; The United States of America; Honorable Donald Hodel, as Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Appellees.

App. 7

Nos. 85-5234, 85-5432, 85-5445,  
86-5034 to 86-5042.

United States Court of Appeals,  
Eighth Circuit.

Submitted May 13, 1986.

Decided Jan. 15, 1987.

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Before LAY, Chief Judge, HENLEY, Senior Circuit Judge, and MAGILL, Circuit Judge.

MAGILL, Circuit Judge.

From 1916 to 1921, appellants' ancestors received fee simple patents, granting them full title to land allotments originally held for them in trust by the United States. These fourteen cases, consolidated on appeal, stem from the government's issuance of those fee patents. Appellants claim that the fee patents were illegally issued to their forebears, thus voiding all later transfers of the property. Appellants seek recognition that the land is still held in trust, return of possession, damages for wrongful possession, and attorneys' fees. Appellees are the United States, the State of South Dakota, Washabaugh County, South Dakota (now Jackson County), and various private landowners who obtained the land in good faith through chain of title. Several title insurance companies filed amicus

curiae briefs for appellees. The district courts<sup>1</sup> entered summary judgment for appellees. We affirm, based on the following: (1) We do not reach the legality of the forced fee patents, as our disposition rests on purely procedural grounds. (2) The statute of limitations in 28 U.S.C. § 2401(a) bars this action as against the United States. (3) The United States is an indispensable party, requiring dismissal of the action as to all appellants with prejudice. (4) Another potential source of limitation on appellants' claims is 25 U.S.C. § 347.

## I. HISTORICAL BACKGROUND

These cases arise from the General Allotment Act (Dawes Act) of February 8, 1887, Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. § 331 *et seq.*). The Dawes Act reflected a:

policy of encouraging the assimilation of Indians into the white man's culture. \* \* This policy was carried out by "alloting" to individual Indians sufficient resources to enable them to become independent farmers and ranchers. \* \* \* As stated in [a] Senate Report [in 1907]:

The policy of allotting Indian lands in severality, so as to break up the old tribal relations, has been going on for years. Ultimately the Indian must become a citizen and work upon the new lines necessarily created by his present environments. He must learn to farm, to raise live stock, and to abandon the aboriginal methods of life. Large

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1. The Hon. Andrew W. Bogue, Chief Judge, United States District Court for the District of South Dakota, Western Division, and The Hon. Donald J. Porter, Chief Judge, United States District Court for the District of South Dakota, Central Division.

## App. 9

areas of Indian lands have already been thus allotted, and many of the tribes have become farmers and stock raisers.

*United States v. Overlie*, 730 F.2d 1159, 1162 (8th Cir. 1984).

The Dawes Act divided up Indian reservations when they could "be advantageously utilized for agricultural or grazing purposes" by the Indians. Indians then received individual land allotments, with the United States holding title in trust for the allottees for twenty-five years, during which time an allotment could not be sold, mortgaged, or taxed. After twenty-five years, the allottee or his heirs received the land in fee simple.

The main purpose of the twenty-five-year trust period was "for the new citizen to become accustomed to his new life, to learn his rights as a citizen, and prepare himself to cope on an equal footing with any white man who might attempt to cheat him out of his newly acquired property \* \* \*". Statement of Rep. Skinner, 18 Cong.Rec. 190 (1886), *quoted in United States v. Mitchell*, 445 U.S. 535, 544 n. 5, 100 S.Ct. 1349, 1354-55 n. 5, 63 L.Ed.2d 607 (1980).

In South Dakota, individual Indian allotments were created by the Act of March 2, 1889, Ch. 405, 25 Stat. 888, which divided the Great Sioux Reservation into seven smaller reservations. *See United States v. Erickson*, 478 F.2d 684, 686 (8th Cir.1973). Sections 8 through 11 of the 1889 Act authorized individual allotments, similar to those created under the Dawes Act, and section 11 provided that "each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of" the Dawes Act. Section 6 of the

Dawes Act stated that "[u]pon the completion of said allotments and the patenting of the lands to said allottees," the allottees would become United States citizens and be subject to the laws of the state or territory in which they lived.

The Supreme Court, in *Matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905), construed section 6 of the Dawes Act to give Indians citizenship and thus subject them to state laws upon the initial issuance of an allotment. In part reacting to this decision, Congress, in the Burke Act of 1906, Ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349), amended section 6 of the Dawes Act to defer citizenship until "the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee \* \* \*." Congress also enacted in the Burke Act the language central to this case:

*Provided*, That the Secretary of the Interior may, in his discretion, and he is authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land s ll be removed  
\* \* \*

Thus the Burke Act shifted the responsibility of issuing fee patents from Congress to the Secretary of the Interior, and gave the Secretary authority to issue fee patents to allottees before the trust period expired.<sup>2</sup> The reason for

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2. Even before this amendment, however, special legislation had been enacted during each session of Congress granting fee simple patents to individual allottees before the twenty-five-year trust period ended. H.R.Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906); *Monson v. Simonson*, 231 U.S. 341, 346, 34 S.Ct. 71, 72-73, 58 L.Ed. 260 (1913).

this shift in responsibility was reflected in the House Committee report:

this provision \* \* \* will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such a stage of civilization as to be able and capable of managing his own affairs.

H.R.Rep. No. 1558, 59th Cong., 1st Sess. 2 (1906).

Another explanation is that the Burke Act was "intended to accelerate the assimilation of the Indians by truncating the length of the trust period and the benefits derived therefrom for Indians determined to be competent." *County of Thurston, State of Nebraska v. Andrus*, 586 F.2d 1212, 1219 (8th Cir.1978), *cert. denied*, 441 U.S. 952, 99 S.Ct. 2181, 60 L.Ed.2d 1057 (1979).

From 1906 to 1916, the Secretary of the Interior granted early fee patents only to allottees who applied and were deemed competent, generally on the local Indian superintendent's recommendation. In 1916, however, Secretary of the Interior Franklin K. Lane began a new policy. Officials of the Department of the Interior were told to visit reservations and determine whether individual Indian allottees were competent. These "competency commissions" issued fee patents to allottees they found competent whether or not the allottees applied for a patent. This became known as the "forced fee patent" policy. Secretary Lane stated, in support of the plan: "we should henceforth make a positive and systematic effort to cast the full burden of independence and responsibility upon an in-



creasing number of the Indians of all tribes. \* \* \* To turn the Indian loose from the bonds of governmental control, \* \* \* this program we are adventuring upon." Letter from Secretary Lane to Representative Stephens, *quoting* the 1914 Annual Report of the Commissioner of Indian Affairs (ARCIA) (March 8, 1916). Commissioner of Indian Affairs Cato Sells noted, however, that "[u]p to this time no fee patents have been issued to Indian allottees unless they made application therefor. \* \* \* Whether the issuance of patents in fee has been of material benefit to Indian allottees is a debatable question. On some reservations the result was disastrous \* \* \*." Letter from Commissioner Sells to Secretary Lane (May 19, 1915).

On April 17, 1917, Commissioner Sells went a step further and issued "A Declaration of Policy," which provided that competency commissions were now to investigate only allottees of one-half or more Indian blood. Under this "blood quantum" policy, allottees of less than one-half Indian blood were presumed competent and received fee patents without investigation. The declaration stated:

To all able-bodied adult Indians of less than one-half Indian blood; there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home.

Indian students, when they are 21 years of age, or over, who complete the full course of instruction in the Government schools, receive diplomas and have demonstrated competency will be so declared.



In 1919 the presumption of competence was extended to adult allottees of one-half Indian blood.

Thousands of Indians in the western United States received forced fee patents, with primarily harsh results. As Judge Porter stated:

Abuses were rampant: it is clear from the historical evidence \* \* \* that many patents were issued to Indians obviously incapable of taking on the burdens of unrestricted property ownership in the midst of a more sophisticated white society. It is clear that some holders of these patents were cheated out of their land by speculators and merchants, and that some land was lost when the Indians sold or mortgaged it for money to pay state property taxes, taxes which could not be legally assessed under the rule of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

*Bordeaux v. Hunt*, 621 F.Supp. 637, 640 (D.C.S.D.1985).

In 1921, however, the entering Harding Administration reversed Sells' policy. Charles H. Burke, former congressman from South Dakota and author of the Burke Act, became the Commissioner of Indian Affairs. On April 1, 1921, he announced in his annual report that an application and examination of competency would once again be required for all allottees. 1921 ARCIA at 23. Commissioner Burke claimed that the previous policy had violated the intent of the Burke Act:

Although for a few years prior to 1921 great numbers of patents were issued during the trust period without application by or consent of patentees, under an erroneous construction of the Act of 1906, the practice was discontinued, and the Office and the Department are endeavoring to remedy as far as possible conditions resulting from the unauthorized release of the property and to protect the interests of those to whom

patents were issued without warrant of law, and the lands are not beyond recovery.

Letter from Commissioner Burke to William Spotted Eagle (January 29, 1929).

In 1927 and 1931 Congress enacted the Cancellation Acts, 44 Stat. 1247, codified at 25 U.S.C. § 352a; and 46 Stat. 1205, codified at 25 U.S.C. § 352b, which allowed the Secretary of the Interior, in certain circumstances, to return patented land to trust status.<sup>3</sup> Less than 500 forced fee patents were cancelled under these statutes, however.

In 1934 Congress enacted the Indian Reorganization Act, Ch. 576, 48 Stat. 984 (codified as amended at 25 U.S.C. § 461 *et seq.*), which extended the trust period indefinitely, stopped future allotments, restricted land sales except to tribes and generally sought to stabilize the tribal land base. The trust period has never expired.

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3. The 1927 Cancellation Act allowed the Secretary to cancel: any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued.

The Cancellation Acts did not give the Secretary complete authority to cancel fee patents, however. Under the 1927 Act, the Secretary could not cancel fee patents where the patentee had "mortgaged or sold any part of the land." The 1931 Act permitted cancellation of fee patents as to those portions of allotments which had neither been sold nor mortgaged.

All of the cases before us arise out of similar facts. The appellants are descendants of Sioux Indians who were issued land allotments and then, before the twenty-five-year trust expired, received fee simple patents without application under the blood quantum policy. All the allottees later transferred or lost title to their property through sale or foreclosure.

## II. DISTRICT COURT PROCEEDINGS

Fourteen cases are consolidated on appeal.<sup>4</sup> Judge Bogue entered summary judgment in favor of the defendants in three consolidated cases.<sup>5</sup> Judge Porter did the same in the remaining cases.<sup>6</sup>

Before Judge Bogue, appellants argued: (1) that they had a vested right to the full trust period; (2) that the Burke Act was inapplicable to them; (3) that the United States violated its fiduciary duty to them; (4) that the blood quantum policy was illegal; (5) that state foreclosures and county tax levies on the property were in-

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4. Mr. Gottschalk, counsel for appellants, pointed out at oral argument that these cases are "test cases" for a number of similar cases existing nationwide, encompassing a total of about 1.5 million acres of land.

5. *Nichols v. Rysavy*, No. 83-5002; *Potter v. South Dakota*, No. 83-5033; and *Ecoffey v. Washabaugh County*, No. 83-5055, published at 610 F.Supp. 1245 (D.C.S.D.1985).

6. *Goins v. Assman*, No. 82-3079; *Bordeaux v. Hunt*, No. 82-3081; *Pritzkau v. Cottonwood Ranch*, No. 82-3082; *Pritzkau v. Larson*, No. 82-3083; *Bonser v. Shelbourn*, No. 82-3084; *LaPoint v. McCormick*, No. 83-3030; *Sanovia v. Handcock*, No. 83-3036; *Bordeaux v. Horn*, No. 83-3048; *Hastings v. Platte Valley Land Investment Co.*, No. 83-3067; and *Hastings v. Massa*, No. 84-3002. As the cases dealt with an identical issue, only *Bordeaux* was published, at 621 F.Supp. 637 (D.C. S.D.1985).

valid; and (6) that the current owners are illegally occupying the land. Judge Bogue based his decision primarily on the finding that the United States, an indispensable party, had not waived its sovereign immunity. He also found that the pertinent statute of limitations, 28 U.S.C. § 2401(a), had expired.

Before Judge Porter, appellants made essentially the same arguments, but without the allegations against the state and county. Judge Porter's opinion addressed the legality of forced patents. He found that the Secretary was within his authority when he issued fee patents without application, and that competency determinations on the basis of age and blood quantum, although "to modern eyes, reprehensible," were also within his authority. Judge Porter also ruled that the allottees consented to the premature issuance of the fee patents.

### III. ISSUES ON APPEAL.

Three major issues are presented on appeal: (1) whether the forced fee patents were void; (2) whether the United States has waived its sovereign immunity; and (3) whether these actions are barred by a statute of limitations. We find it unnecessary to resolve the legality of the forced fee patents and the sovereign immunity issue, because the statute of limitations issue is dispositive.

### IV. DISCUSSION.

#### A. Standard of Review.

This court clearly set out the standard of review of a district court's grant of summary judgment in *Kegel v. Runnels*, 793 F.2d 924, 926-27 (8th Cir.1986). We adhere to that standard in this case.

B. District Court Jurisdiction Under Section 345.

Appellants argue that 25 U.S.C. § 345 entitles them to bring this suit against the United States.<sup>7</sup> Appellees' response addresses both appellants' interpretation of section 345 and the threshold question of the section's applicability.

Appellees first argue that district courts are vested with jurisdiction only with respect to suits for an "original allotment," *i.e.*, only if an Indian claims to have been unlawfully denied an allotment in the first instance does

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7. 25 U.S.C. § 345, one of the jurisdictional bases for the district court in this case, reads:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: *Provided*, That the right of appeal shall be allowed to either party as in other cases.

section 345 apply. Appellees cite *First Moon v. White Tail*, 270 U.S. 243, 245, 46 S.Ct. 246, 70 L.Ed.2d 575 (1926) for the proposition that section 345 did not confer jurisdiction over “disputes concerning the heirs of one who held a valid and unquestioned allotment.” This argument need not detain us long.

*United States v. Mottaz*, — U.S. —, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986), was decided after briefing and oral argument in this appeal. In *Mottaz*, an allottee’s heir inherited land whose title the United States held in trust. The government sold the land to the United States Forest Service, allegedly without her consent, pursuant to 25 U.S.C. § 483, which allowed the Secretary of the Interior “upon application of the Indian owners \* \* \* to approve conveyances, with respect to lands or interests in lands held by individual Indians \* \* \*.” She sued for the fair market value of the land. The district court granted the government’s motion for summary judgment based on 28 U.S.C. § 2401(a), the general six-year statute of limitations governing actions against the United States.<sup>8</sup> On appeal, this court held in *Mottaz v. United States*, 753 F.2d 71 (8th Cir.1985), that no cause of action could accrue on a void transaction, and we remanded the case to the district court

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8. 28 U.S.C. § 2401(a) states in pertinent part:

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

to determine whether the sale was in fact void, thus barring the United States' statute of limitations defense.

The Supreme Court granted certiorari and reversed on other grounds. The Court expressly declined to decide whether the six-year statute of limitations in 28 U.S.C. § 2401(a) applied to actions brought under section 345 of the Dawes Act, instead holding that the suit was within the scope of the Quiet Title Act, which applies where the United States claims an interest in the land. Thus the applicable statute of limitations was subsection (f) of the Quiet Title Act, 28 U.S.C. § 2409(a).<sup>9</sup> The Court held that because the plaintiffs clearly had notice of the government's claim more than twelve years before filing suit, section 2409a(f) barred their claim. The Supreme Court nonetheless examined section 345 and stated:

Section 345 grants federal district courts jurisdiction over two types of cases: (i) proceedings "involving the right of any person, in whole or in part of Indian blood or descent, to any allotment under any law or treaty," and (ii) proceedings "in relation to" the claimed right of a person of Indian descent to land that was once allotted. Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment \* \* \* and suits involving "the interests and rights of the Indian in his allotment or patent after he has acquired it" (citations omitted).

*Mottaz*, 106 S.Ct. at 2231.

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9. 28 U.S.C. § 2409a(f) states:

Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.



We thus conclude, based on this clear language, that section 345 gives federal district courts jurisdiction over suits involving a claim to an already existing allotment.

Appellees also argue that section 345 did not vest the district courts in this case with jurisdiction because this suit is challenging Indian land policy. They cite *Fontenelle v. Omaha Tribe of Nebraska*, 430 F.2d 143, 146 (8th Cir.1970), in which this court stated that section 345 "does not give federal District Courts the right to determine Indian land policy. (citations omitted). The Supreme Court recognized\*\*\* that 'judicial examination' would be necessary to separate right from policy. *Arenas v. United States*, *supra*, 322 U.S. [419] at 432, 64 S.Ct. 1090 [at 1095-96, 88 L.Ed.2d 1363 (1944)]."

Appellants respond that a question of right, not policy, is at issue here, and our judicial examination leads us to agree. Appellants' basic contention is that the forced fee patent scheme was illegal, and deprived them of a vested right to their allotments. Appellees cannot maintain that it was the Commissioner's policy to act illegally. We thus conclude that the district courts properly exercised jurisdiction over these cases.

Appellees next argue that section 345, which governs suits for "allotments," does not apply here because the parcels of land in question are no longer allotments. Appellees argue that because section 345 is thus inapplicable, the United States has not waived its sovereign immunity. This argument echoes Judge Bogue's finding in the district court.



Judge Bogue, in deciding that the United States retained its sovereign immunity from suit, first examined section 345 and its scope. He concluded that appellants' suit fell outside the scope of section 345 because it was "not an action for an allotment." 610 F.Supp. at 1252. Citing the definitions of "allotment" found in *Affiliated Ute Citizens of Utah v. United States*,<sup>10</sup> and Cohen's Handbook of Federal Indian Law,<sup>11</sup> he reasoned that when appellants' decedents received their fee patents, the lands lost their status as trust lands and thus were no longer considered allotments. Judge Bogue concluded: "Applying the two definitions of allotments to the current situation, it is clear that § 345 does not apply because the action does not involve an allotment, but deals with land held in fee by the present owners. Therefore, § 345 is not a waiver of sovereign immunity."

To this reasoning, appellants respond that because the forced fee patent scheme was illegal, it was ineffective to terminate the trust, and despite the purported subsequent transfers, the land retains its status as trust land and section 345 applies. Appellants maintain that the "[district]

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10. "Allotment is a term of art in Indian law. (citation omitted). It means a selection of specific land awarded to an individual allottee from a common holding. (citation omitted). Section 345 authorizes and provides governmental consent for only actions for allotments." 610 F.Supp. at 1252, *quoting* 406 U.S. 128, 142, 92 S.Ct. 1456, 1466, 31 L.Ed.2d 741 (1972).

11. "[An allotment describes] either a parcel of land owned by the United States in trust for an Indian ('trust' allotment), or owned by an Indian subject to a restriction-on alienation in favor of the United States or its officials ('restricted fee' allotment)."

F. Cohen, *Handbook of Federal Indian Law* 615-16 (1982).

court's reasoning was that since the court determined that plaintiffs should lose on the merits, the court therefore had no jurisdiction."

We need not resolve this issue, because assuming *arguendo* that these parcels are allotments despite the transfers, the statute of limitations in 28 U.S.C. § 2401(a) has run and bars this action as against the United States.<sup>12</sup>

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12. Dictum in *Mottaz* suggests that even a clear finding that these parcels of land are allotments might nonetheless fail to waive the sovereign immunity of the United States. The Court stated:

Section 345 thus contemplates two types of suits involving allotments: suits seeking the issuance of an allotment \* \* \* and suits involving "the interests and rights of the Indian in his allotment or patent after he has acquired it" (citations omitted).

*The structure of § 345 strongly suggests, however, that § 345 itself waives the Government's immunity only with respect to the former class of cases: those seeking an original allotment. \* \* \* Accordingly, in Affiliated Ute Citizens v. United States, 406 U.S. 128, 92 S.Ct. 1456, 31 L.Ed.2d 741 (1972), this Court held that, to the extent that § 345 involves a waiver of federal immunity, as opposed to a grant of subject-matter jurisdiction to the district courts, that section "authorizes, and provides governmental consent for, only actions for allotments." 406 U.S., at 142, 92 S.Ct., at 1466.*

*Mottaz*, 106 S.Ct. at 2231-32 (emphasis added).

Even if this case were construed to involve an allotment, it is clearly an action "in relation to" the claimed right of an Indian to an allotment, rather than a suit "seeking the issuance of an allotment." Thus, as the Supreme Court suggests, even if these parcels are allotments, section 345 might nonetheless not waive the United States' sovereign immunity in this case.

C. Statute of Limitations.

28 U.S.C. § 2401 provides a general six-year statute of limitations governing suits against the United States.

Appellants, citing legislative history, argue that section 2401(a) is inapplicable. Section 2401(a) derives from 28 U.S.C. § 41(20) of the 1940 Code, which they contend did not limit actions by Indians concerning their right to allotments. They argue that because the 1948 revision creating section 2401(a) did not purport to change the law as to allotments, no such change should be inferred, quoting *Anderson v. Pacific Coast Steamship Co.*, 225 U.S. 187, 199, 32 S.Ct. 626, 630, 56 L.Ed. 1047 (1912): "it will not be inferred that Congress, in revising and consolidating the laws, intended to change their effect unless such intention is clearly expressed." Appellants maintain that the sole purpose of the revision was to combine the time limit for contracts and torts into one provision. They conclude that a later, general statute of limitations has no effect on a prior, specific statute, particularly where Indian rights are involved. *Morton v. Mancari*, 417 U.S. 535, 550-51, 94 S.Ct. 2474, 2482-83, 41 L.Ed.2d 290 (1974).

Appellees, predictably, view the legislative history differently. They argue that section 2401(a) "not only served to consolidate the provisions of Section 41(20), the Tucker Act and Section 942 of Title 28 U.S.C., 1940 Ed., (footnote omitted) it also created a general statute of limitations insofar as suits against the United States are concerned." *Werner v. United States*, 188 F.2d 266, 268 (9th Cir.1951).

The Ninth Circuit has spoken clearly regarding the applicability of section 2401(a) to section 345 claims. The rationale in *Werner* was upheld in *Loring v. United States*, 610 F.2d 649, 650 (9th Cir.1979), in which section 2401(a)

was invoked to dismiss an allotment claim against the United States. Most recently, in *Christensen v. United States*, 755 F.2d 705, 707 (9th Cir.1985), the Ninth Circuit, after examining the *Loring* and *Werner* decisions, stated that "we cannot escape the conclusion that section 2401(a) applies to *all* actions brought under section 345, whether the relief requested is legal or equitable."<sup>13</sup>

We follow the Ninth Circuit in holding that section 2401(a) applies to section 345 actions. We do so for the following reasons. First, the language of section 2401(a) is clear and definitive. "Absent a clearly expressed legislative intention to the contrary, [the] language [employed by Congress] must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980).

Second, we note the arguments urged by *amici* and summed up in *Lewis v. Marshall*, 30 U.S. (5 Pet.) 470, 477-78, 8 L.Ed. 195 (1831):

The best interests of society require that causes of action should not be deferred an unreasonable time. This remark is peculiarly applicable to land titles. Nothing so much retards the growth and prosperity of a country as insecurity of titles to real estate. Labor is paralyzed, where the enjoyment of its fruits is

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13. In so concluding, the Ninth Circuit noted its awareness of *Sampson v. United States*, 533 F.2d 499 (9th Cir.1976), in which no statute of limitations was applied to a section 345 claim that had accrued in 1926. The court stated that "speculation as to any *sub silentio* ruling in *Sampson* on the inapplicability of section 2401(a) to section 345 actions is rendered unnecessary by the explicit holdings in *Loring* and *Werner*, to which we are bound." *Christensen*, 755 F.2d at 708.

uncertain; and litigation without limit produces ruinous consequences to individuals.

It remains to determine when the statute of limitations in section 2401(a) began to run. Appellants assert that because the section was amended in 1978, that is the pertinent date setting the statute running, and because all the actions under discussion were filed within six years of 1978, they are not barred.

We reject this argument. The 1948 version of section 2401(a) read, in pertinent part, as follows:

Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues.

The 1978 revision added the following language:

*Except as provided by the Contract Disputes Act of 1978*; every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. (emphasis added).

The Contract Disputes Act of 1978 has no bearing on this suit. Thus the 1978 amendment wrought no changes upon the section's effect here.

It would be untenable to hold that the 1948 enactment of section 2401(a) instantly rendered appellants' claims time-barred, as all the claims had accrued some twenty-eight years previously. In *Block v. North Dakota ex rel. Board of University and School Lands*, 461 U.S. 273, 286 n. 23, 103 S.Ct. 1811, 1819, n. 23, 75 L.Ed.2d 240 (1983), the Supreme Court noted that "[t]he Constitution \* \* \* requires that statutes of limitations must 'allow a reason-

able time after they take effect for the commencement of suits upon existing causes of action' " (citations omitted).

Conversely, it would be unfair to hold that those suits accruing before section 2401(a) was enacted were not subject to a statute of limitations, while those suits accruing after the enactment of the section were subject to its strictures.

We therefore hold that the causes of action at issue here "accrued" when section 2401(a) was enacted. Thus appellants had six years from that time, June 25, 1948, in which to bring suit, which they have failed to do. Their actions are therefore time-barred.

Appellants finally argue that because the forced fee patents were void, no statute of limitations applies. They argue that because the Secretary exceeded his authority in issuing the fee patents, the patents were ineffective to terminate the trust. In this regard they cite this court's decision in *Mottaz v. United States*, 753 F.2d 71, 74 (8th Cir. 1985), *rev'd*, — U.S. —, 106 S.Ct. 2224, 90 L.Ed.2d 841 (1986). In *Mottaz*, we held that a cause of action cannot accrue on a void transaction, so that if the forced fee patents were void, the United States would have no statute of limitations defense.

We stated that "[i]t has been well established \* \* \* that a sale of restricted allotment land in violation of the federal restrictions on its alienability does not transfer title, and that the allottee or her heirs may not be barred by state statutes of limitation or laches from bringing suit to establish that they retain title to the land." We noted, however, that "[t]he parties cite no case which squarely considered whether *Ewert* [*v. Bluejacket*, 259 U.S. 129, 42

S.Ct. 442, 66 L.Ed. 858 (1922)] prevents the application of *federal* statutes of limitation." We conclude that appellants' reliance on this case is misplaced for two reasons.

First, as noted, the Supreme Court reversed our reasoning in *Mottaz* after briefing and oral argument in this case. Although the Supreme Court declined to apply section 345 or section 2401(a) in *Mottaz*, a reasonable inference can be made that the Court intended a statute of limitations to be able to run on even a void transaction. The plaintiff in *Mottaz* alleged, as do appellants here, that the land sales were illegal and therefore void. The Supreme Court summarized:

The Court of Appeals ruled that such a claim could not be time barred. \* \* \* [T]he Court of Appeals found that § 2401(a) "does not bar claims of title to allotments because *Ewert* [*v. Bluejacket*, 259 U.S. 129, 42 S.Ct. 442, 66 L.Ed.2d 858 (1922)] is based on the principle that, if the underlying sale of land is void, the concept that a cause of action 'accrues' at some point is inapplicable because the allottee simply retains title all along."

*Mottaz*, 106 S.Ct. at 2228, quoting 753 F.2d at 74.

Although the Supreme Court reversed on other grounds, the Court's rejection of our holding is implicit in its holding that the statute of limitations in the Quiet Title Act barred the action. The Court held:

Congress has consented to a suit challenging the Federal Government's title to real property only if the action is brought within the 12-year period set by the Quiet Title Act. The limitations provision of the Quiet Title Act reflects a clear congressional judgment that *the national public interest requires barring stale chal-*



*lenges to the United States' claim to real property, whatever the merits of those challenges.*

*Mottaz*, 106 S.Ct. at 2234 (emphasis added).

By rejecting our reasoning that the case had to be remanded because the transactions were possibly void, the Supreme Court rejected our view that a statute of limitations could not run against a void patent.

Second, the facts governing the disputed land transfers in this case are significantly different from those in *Mottaz*. In our decision in *Mottaz* and the cases cited therein, the purported sales took place contrary to explicit statutory prohibitions against premature alienation. In this case, there is explicit statutory authorization for premature alienation. Appellants take issue not with the substance of the Burke Act itself, which is a federal statute authorizing alienation, but with what they contend is the Secretary's erroneous interpretation and application of that Act.<sup>14</sup>

This creates the dispositive distinction between the patents in *Mottaz* and the patents here: the former were possibly void, while these are possibly voidable.

The Supreme Court set out the distinction between void and voidable in *United States v. Schurz*, 102 U.S. (Otto) 378, 400-01, 26 L.Ed. 167 (1880):

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14. Appellants also contend that because the allotments in South Dakota were made under the 1889 Act, rather than the 1887 Dawes Act, the Burke Act, as an amendment to the Dawes Act, never applied to South Dakota. Judge Porter disposed of this contention clearly and definitively in *Bordeaux v. Hunt*, 621 F.Supp. at 640-41. We can add nothing to his discussion on that issue and adopt it as our own.



But the distinction between a void and voidable instrument, though sometimes a very nice one, is still a well-recognized distinction on which valuable rights often depend. \* \* \* The question whether any particular tract, belonging to the government, was open to sale, pre-emption, or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such question and of conflicting claims to the same land by different parties is judicial in its character.

\* \* \*

The whole question is one of disputed law and disputed facts. It was a question for the land-officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void.

In *Proctor v. Painter*, 15 F.2d 974, 975 (9th Cir.1926), the court stated: "The question whether a patent from the United States for public lands is valid or invalid is not always one of easy solution. The Supreme Court has repeatedly held that patents for lands which have been previously granted, reserved or appropriated are absolutely void. (citations omitted). On the other hand, if the Land Department has jurisdiction to dispose of the land and to issue a patent therefor, an erroneous determination of the facts upon which the right to a patent depends, or an entire failure to determine such facts, will not avoid the patent."

Appellants' claim falls precisely within this second category, for they claim that the Secretary failed entirely to determine the facts necessary to trigger the issuance of their ancestors' fee patents; i.e., were the ancestors competent, and did they want a fee patent. Simply put, a fee

patent is void if the Secretary lacked the power to confer it. The fee patent is voidable if the Secretary had the power, but used it wrongly. Here, the power to confer the fee patents is in the Burke Act. Appellants' [sic] contend that the power was abused. The consequences of this distinction are clear. In *Schurz*, the Court stated at 401-02: "The mode of avoiding [the fee patent], if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partly wrong."

Because the fee patents at issue were not void, but possibly voidable, they were not the "nullity" that appellants propose, but were (if voidable) subject to possible nullification only upon the initiation of a suit. Because a suit was required to challenge their validity, the pertinent statute of limitations is applicable. Hence, section 2401(a) applies to appellants' claims.

Appellants argue, however, that 28 U.S.C. § 2415 waives the time limit in section 2401(a).<sup>15</sup> Originally en-

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15. 28 U.S.C. § 2415 states in pertinent part:

§ 2415. *Time for commencing actions brought by the United States*

(a) [E]xcept as otherwise provided by Congress, every action for money damages brought by the United States \* \* \* which is founded upon any contract express or implied in law or fact, shall be barred unless the complaint is filed within six years after the right of action accrues or within one year after final decisions have been rendered in applicable administrative proceedings required by contract or by law, whichever is later \* \* \*. *Provided further*, That an action for money damages brought by the United States for or on behalf of a recognized tribe, band or group of American Indians shall not be barred unless the complaint is filed more than six years and ninety days after the right of action accrued \* \* \*. *Provided*, That, for those claims

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acted in 1966, section 2415 provided a limitations period of six years and ninety days for suits brought by the United States on behalf of Indians. Claims that accrued before July 18, 1966, when section 2415 was enacted, were deemed to have accrued on that date. "In 1972 and again in 1977, 1980, and 1982, as the statute of limitations was about to expire for pre-1966 claims, Congress extended the time within which the United States could bring suits on behalf of Indians." *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 1255, 84 L.Ed.2d 169 (1985).

In the 1982 amendment, the Indian Claims Limitation Act of 1982, Pub.L. No. 97-394, 96 Stat. 1976, Congress directed the Secretary of the Interior to publish in the Federal Register a list of all Indian claims to which the statute of limitations in section 2415 applied. The Act also directed the Secretary to notify Indians potentially interested in those claims. The Indians then could submit additional claims, which were published on a second list.<sup>16</sup>

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that are on either of the two lists published pursuant to the Indian Claims Limitation Act of 1982, any right of action shall be barred unless the complaint is filed within (1) one year after the Secretary of the Interior has published in the Federal Register a notice rejecting such claim \* \* \* .

\* \* \* \* \*

(c) Nothing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property.

16. Mr. Gottschalk, counsel for appellants, pointed out at oral argument that: "It was basically the result of the federal government initiating an inquiry into what possible claims might exist and be subject to [section] 2415, people became aware they might have actions and that was the impetus for the filing of these lawsuits."

Actions subject to the statute of limitations in section 2415 that were on neither list were barred unless begun within sixty days of the second list's publication. If the Secretary decides not to pursue a listed claim, "any right of action shall be barred unless the complaint is filed within one year after the date of publication [of the notice of the Secretary's decision] in the Federal Register."

"Congress [thus] intended to give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf. Thus, we think the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations." *Oneida*, 105 S.Ct. at 1256. Appellants rely on this language to argue that their claims are not time-barred. They claim that "Congress knew that by definition all of the forced fee cases were based on actions prior to 1966. Therefore, 28 U.S.C. § 2415 either overrides § 2401 or it affects the time that the six-year period in § 2401 starts running, *i.e.*, from the date the rejection list in the 1982 amendments to § 2415 is published."

In deciding whether section 2401 is affected by section 2415, we are guided by familiar principles. "[W]hen two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S.Ct. 2474, 2483, 41 L.Ed.2d 290 (1974). We find no "clearly expressed congressional intention" in section 2415 to overrule section 2401 as applied to section 345 claims brought against the United States, and we find that the two statutes are capable of coexistence. Section 2415(a) and (b) begin as follows: "Subject to the provisions of section 2416 of this title, and

*except as otherwise provided by Congress \* \* \**” (emphasis added). We find that Congress has clearly provided otherwise in section 2401(a).

Furthermore, as the Supreme Court stated in *Mottaz*, when confronted with this issue:

The Indian Claims Limitation Act of 1982, 96 Stat. 1976, which amended 28 U.S.C. § 2415(a), essentially tolls—for a time—the general 6-year statute of limitations for many damages actions that may be brought *by* the Federal Government on behalf of Indians. Respondent claims that § 2415 also shows that Congress did not intend the general 6-year statute of limitations for damages actions brought *against* the Federal Government, 28 U.S.C. § 2401, to apply to her claim. *But § 2415 is expressly inapplicable to actions “to establish the title to, or right of possession of, real or personal property.” 28 U.S.C. § 2415(c).*

*Mottaz*, 106 S.Ct. at 2232 n. 10 (emphasis both in original and added).

We therefore conclude that 28 U.S.C. § 2415 does not affect the running of the six-year statute of limitations in section 2401(a) in this suit.

Finally, we note that 25 U.S.C. § 347 is a possible independent source of limitation on appellants’ claims.<sup>17</sup>

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17. 25 U.S.C. § 347 provides:

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has

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The South Dakota statute of limitations for recovery of title and possession of land and for rents or profits therefrom is twenty years. *See S.D. Codified Laws* §§ 15-3-1, 15-3-2, 15-3-7 and 15-3-10 (1984). Whether the time period is measured from the date of the allottees' deeds or from the last date on which they occupied the land, it has expired.

Because the statute of limitations in section 2401(a) bars this suit against the United States, we now turn to the argument that the United States is an indispensable party, and the suit must be dismissed in its absence.

#### D. Indispensable Party.

Appellants argue that the United States, even if protected from suit by section 345 or section 2401, is not an indispensable party, and the action may proceed without it. They cite *Bird Bear v. McLean County*, 513 F.2d 190 (8th Cir. 1975), stating that the United States need not be a party where the action is one to protect trust land. They argue that complete relief is available without the United States, for the land could be returned to the allottees and damages paid. They claim no substantial risk of inconsistent obligations, because the United States has refused to sue on behalf of the allottees, thus making its position clear.

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been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians.



Judge Bogue held the United States to be an indispensable party, requiring dismissal of the entire action with prejudice pursuant to Fed.R.Civ.P. 19(b).<sup>18</sup> Appellants, however, urge the following definition of indispensable party:

An indispensable party is one who has such an interest in the subject-matter of the controversy that a final decree cannot be rendered between the other parties to the suit without radically and injuriously affecting his interest, or without leaving the controversy in such a situation that its final determination may be inconsistent with equity and good conscience.

*Silver King Coalition Mines Co. of Nevada v. Silver King Consolidated Mining Co. of Utah*, 204 F. 166, 169 (8th Cir. 1913).

Appellants argue that under this standard, an action to protect trust land may be brought in "equity and good conscience" without involving the United States. See *Puyallup Indian Tribe v. Port of Tacoma*, 717 F.2d 1251 (9th Cir.1983), *cert denied*, 465 U.S. 1049, 104 S.Ct. 1324, 79 L.Ed.2d 720 (1984).

In deciding this issue, we are guided by the Supreme Court's decision in *Provident Tradesmens Bank & Trust*

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18. This section requires us to look at the following factors in deciding whether to dismiss a suit:

first, to what extent a judgment rendered in the [United States'] absence might be prejudicial to [the United States] or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the [United States'] absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

*Co. v. Patterson*, 390 U.S. 102, 109-11, 88 S.Ct. 733, 737-39, 19 L.Ed.2d 936 (1968). The Court examined Rule 19(b) as follows:

Rule 19(b) suggests four "interests" that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled. \* \* \* First, the plaintiff has an interest in having a forum. \* \* \* Second, the defendant may properly wish to avoid multiple litigation, or inconsistent relief, or sole responsibility for a liability he shares with another. \* \* \* Third, there is the interest of the outsider whom it would have been desirable to join. \* \* \* Fourth, there remains the interest of the courts and the public in complete, consistent, and efficient settlement of controversies.

The Court noted that: "Whether a person is 'indispensable', that is, whether a particular lawsuit must be dismissed in the absence of that person, can only be determined in the context of particular litigation. \* \* \* [A] court does not know whether a particular person is 'indispensable' until it has examined the situation to determine whether it can proceed without him." *Id.* at 118-19, 88 S.Ct. at 742-43.

We followed this four-part test in *Fetzer v. Cities Service Oil Co.*, 572 F.2d 1250, 1253 (8th Cir.1978), and stated that "the Supreme Court [in *Provident Tradesmens*] rejected an inflexible and formulistic approach to joinder problems. The Court made it clear that Rule 19(b) requires a district court to undertake a 'practical examination of the circumstances,' 390 U.S. at 119-20, n.16, 88 S.Ct. 733 [743, n.16] in order to determine whether it



must dismiss the action or may 'in equity and good conscience' proceed without an absent party."

We therefore turn to an examination of the four factors as expressed in *Provident Tradesmens*. The first factor is the plaintiff's interest in a forum.

This factor obviously weighs in favor of appellants. The *Provident Tradesmens* Court stated at 109, n. 3 that "[T]he court should consider whether there is any assurance that the plaintiff, if dismissed, could sue effectively in another forum where better joinder would be possible." If the action is dismissed, "better joinder" in another forum would still be an impossibility regarding the United States. The principles regarding possible sovereign immunity under section 345 and the statute of limitations for suits against the United States under Section 2401(a) would still apply in another forum.

The second factor is the defendant's wish to avoid multiple litigation, inconsistent relief, or sole responsibility for liability he shares with another. This interest meshes closely with the third factor, which requires us to consider the interest of the outsider whom it would have been desirable to join. In examining these two factors, we note that if appellants prevailed in this suit, the United States would be reinstated as trustee over the land, with the concomitant resumption of fiduciary responsibility, and could also be subject to claims for damages by the present owners. Furthermore, the result of this suit, on the merits, would depend entirely on whether the United States acted legally or illegally in granting fee patents under the blood quantum policy. If the United States issued the patents legally, then appellants' action is ground-

less. "In short the government's liability cannot be tried 'behind its back' " (citation omitted). *Mine Safety Appliances Co. v. Forrestal*, 326 U.S. 371, 375, 66 S.Ct. 219, 221-22, 90 L.Ed. 140 (1945).

As appellants point out, the United States need not be a party defendant in all section 345 cases, "because the United States would obviously not be a proper party in many private disputes that relate to land claims originally granted by various allotment acts." *Mottaz*, 106 S.Ct. at 2231 n. 9. For instance, where an Indian allottee sold land and did not receive bargained-for consideration, cf. *Vicenti v. United States*, 470 F.2d 845 (10th Cir.1972), *cert dismissed*, 414 U.S. 1057, 94 S.Ct. 561, 38 L.Ed.2d 343 (1973), such a dispute did not appropriately involve the United States. Another example is found in *Begay v. Albers*, 721 F.2d 1274 (10th Cir.1983), in which Indian allottees alleged that their allotments had been transferred by forged deeds. These cases sharply contrast with the present case, where the claim is based on the assertion that the United States wrongfully issued the fee patents. As this court stated in *Antoine v. United States*, 637 F.2d 1177, 1181 (8th Cir.1981): "The United States, as the allotting agent, is the appropriate defendant in suits involving the right to an allotment. In our view, determining whether an Indian should have received a patent for an allotment of land under section 345 requires the presence of no party other than the United States." As appellee South Dakota points out: "it seems absurd to argue, as the plaintiff does, 'for an order declaring that the United States still holds the allotment in trust for [appellants] and ordering the federal defendants to ensure the necessary records reflect such title,' \* \* \* and then assert that the United States

is not indispensable.” We conclude that these two factors weigh heavily in favor of appellees, and dismissal of the action.

The fourth factor to consider is the interest of the courts and the public in complete, consistent, and efficient settlement of controversies. In this regard, we note Judge Bogue’s observations that:

Thus, these forced fee patent claims have far reaching social, economic, and political ramifications \* \* \*. Title to millions of acres of land is clouded, thus affecting real estate transactions, probate proceedings, and credit availability. In other words, thousands of landowners are effectively barred from selling their land.

Another ramification involves the validity of a fee patent issued by the U.S. Government. If these fee patents can be successfully attacked, the entire United States title system is in jeopardy. Title insurance companies, who relied on the fee patent, would face financial ruin. “The return of the land to trust status would potentially result in a checkerboard effect on civil and criminal jurisdiction, and would certainly remove the land from the tax base of the county and local school district.” *Quoting LaFave*, 30 S.D.L.Rev. 60, 96 (1985).

*Nichols*, 610 F.Supp. at 1254.

In view of the above, we conclude that this factor as well weighs in favor of dismissal of the action.

Examining these four factors, we conclude that the absence of the United States from this suit requires dismissal of the suit in its entirety, with prejudice, against all appellants.

Accordingly, we affirm the district courts' grants of summary judgment.<sup>19</sup>

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19. We note independent grounds for dismissal of the suit against appellee South Dakota. In their amended complaint, appellants asserted a cause of action under 42 U.S.C. § 1983 against South Dakota. South Dakota asserted eleventh amendment immunity as an affirmative defense. Although neither issue was briefed by the parties, we find South Dakota's defense valid. Section 1983 provides a cause of action only against "person[s]." A state is immune from a section 1983 suit under the eleventh amendment. Appellants also impermissibly seek damages against South Dakota rather than the prospective injunctive relief contemplated by section 1983. See *Quern v. Jordan*, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979); *Alabama v. Pugh*, 438 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978). See also *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 105 S.Ct. 1245, 1260-61, 84 L.Ed.2d 169 (1985). Furthermore, in *Wilson v. Garcia*, 471 U.S. 261, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985), the Supreme Court held that all section 1983 claims are governed by the appropriate state statute of limitations for personal injury actions. The appropriate statute in this case is S.D. Codified Laws 15-12-14(3) (1984), which runs three years after the cause of action accrues and thus has long expired.

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App. 41

Katherine B. NICHOLS, Individually, and as Special Administratrix of the Estate of Amelia Huston Nichols No. 593, deceased, Plaintiff,

v.

Don RYSAVY, et al., Defendants.  
Clover POTTER, Individually, and as Special Administratrix of the Estate of James Wilde, Plaintiff,

v.

STATE OF SOUTH DAKOTA, et al., Defendants.  
Gladys ECOFFEY, Individually, and as Special Administratrix of the Estate of John Yellow Bird, Plaintiff,

v.

WASHABAUGH COUNTY, et al., Defendants.

Civ. Nos. 83-5002, 83-5033 and 83-5055.

United States District Court,  
D. South Dakota, W.D.

May 10, 1985.

BOGUE, Chief Judge.

### STATEMENT OF THE CASE

These three cases were consolidated pursuant to F.R.C.P. 42(a) for the purpose of determining motions to dismiss filed in each of the three forced fee patent cases.<sup>1</sup>

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1. Forced fee patent claims are based on the issuance of fee patents to Indian allottees without their application or express consent, and before the expiration of the standard 25-year trust period. Such patents were issued in two ways: 1) competency commissions declared an Indian allottee competent to assume full ownership of allotment; or 2) allottees of one-half or less Indian blood quantum were issued patents as a matter of policy. LaFave, *South Dakota's Forced Fee Indian Land Claims: Will Landowners Be Liable For Government's Wrongdoing?* 30 S.D.L.Rev. 60, 61 FN 5 (1985).

These three cases are actions to recover title and possession of former allotments on the Rosebud and Pine Ridge Indian Reservations from which the Plaintiffs claim to have been unlawfully denied and excluded and of which they claim to be entitled by virtue of acts of Congress. Plaintiffs further sue for injunctive declaratory relief against the federal Defendants (United States of America, James Watt, as United States Secretary of the Interior, and Ken Smith, as Assistant Secretary of the Interior for Indian Affairs), claiming that the federal Defendants have breached their fiduciary duty imposed by law to protect and defend Plaintiffs' rights to the subject property and profits therefrom and ordering the federal Defendants to take all action necessary to protect and defend the Plaintiffs' rights to the subject property and the profits therefrom. In *Potter and Ecoffey*, the Plaintiffs also seek money damages from the federal Defendants. In addition, the Plaintiffs have sued certain non-federal Defendants.

In *Nichols*, the Plaintiff sued private defendants, Rysavy, *et al.*, (present and past owners/occupiers from July 15, 1943 to present) for damages for trespass, conversion and unlawful exclusion from the subject property, an accounting for rents and profits, and for injunctive relief to enjoin them from interfering with plaintiff's free use and enjoyment of the land.<sup>2</sup> Katherine Nichols is the Special Administratrix of the Estate of Amelia Nichols, Rosebud Sioux Allottee No. 593. Ms. Nichols is a daughter-in-law, not a lineal descendant of Amelia Nichols.

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2. Nine title insurance companies jointly filed an amici curiae brief on behalf of the Defendants in *Nichols v. Rysavy*.

In *Potter*, the Plaintiff seeks money damages against the State of South Dakota, because South Dakota, through its Rural Credit Board, foreclosed against this property in 1927, and retained the mineral rights. The surface estate was later sold. The Plaintiff claims that the foreclosure and retention of mineral rights violated her civil rights under 42 U.S.C. § 1983. The Plaintiff also seeks an order declaring that the South Dakota state court judgment is null and void. Defendant Jacob Sharp is the present owner. No past landowners were joined in this action. Clover Potter is a lineal descendant and Special Administratrix of the Estate of James Wilde, Oglala Sioux Tribe, Pine Ridge Agency, Allottee No. 3759.

In *Ecoffey*, the Plaintiff seeks damages against Washabaugh County, claiming that the County violated her civil rights under 42 U.S.C. § 1983 by levying taxes on land upon which a void fee patent was issued. Washabaugh County levied taxes on the property in the amount of \$403.77 after the issuance of the fee patent. No past or present landowners were joined in this action. Gladys Ecoffey is a lineal descendant and Special Administratrix of the Estate of John Yellow Bird, Pine Ridge Allottee No. 4202.

In addition, each of the non-federal defendants in all three cases have cross-claimed against the federal government, seeking indemnification if they are held liable. In *Nichols*, Defendant Novotny has also filed a counterclaim against the Plaintiff seeking compensation for improvements made on the property.

## HISTORICAL PERSPECTIVE

“The origin of the forced fee patent claims can be traced to the period in the administration of Indian affairs



known as the allotment period, 1887 to 1933." LaFave, *supra*, at 62. In South Dakota, this requires the examination of three Acts: 1) The General Allotment Act (Dawes Act) of 1887<sup>3</sup>, 2) Act of March 2, 1889,<sup>4</sup> and 3) The Burke Act of 1906.<sup>5</sup>

#### A. GENERAL ALLOTMENT ACT (DAWES ACT) OF 1887

Under the Dawes Act, individual Indians received parcels of land, called allotments, title to which was to be held in trust by the United States for the benefit of the allottee for a period of twenty-five years. During the trust period, the land could not be sold, mortgaged or taxed. After expiration of the trust period, the allottees would receive an unrestricted fee patent to the allotment, along with full United States citizenship. Although the trust period was to have expired twenty-five years after the issuance of the allotment, the trust period was extended indefinitely by Congress, and has never expired. LaFave, *supra*, at 64 and 70.

#### B. ACT OF MARCH 2, 1889

An Act of March 2, 1889, divided the Great Sioux Reservation into several smaller reservations. This Act provided a scheme for allotments in Western South Dakota. This Act also incorporated Section 6 of the General Allotment Act (Dawes Act). Ch. 405, 25 Stat. 888.

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3. Ch. 119, 24 Stat. 388 (Codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354, and 381).

4. Ch. 405, 25 Stat. 888.

5. Ch. 2348, 34 Stat. 182 (Codified at 25 U.S.C. §349).



## C. BURKE ACT OF 1906

The Burke Act of 1906, 25 U.S.C. § 349, amended Section 6 of the General Allotment Act. This amendment was enacted in response to two different situations. First, was the 1905 case of *Matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905), in which the U.S. Supreme Court declared Indians became citizens upon the initial issuance of an allotment. This meant that the Indians were subject to state law, particularly the sale of liquor. Second, was the increasing number of bills enacted by Congress authorizing the issuance of unrestricted fee patents prior to the expiration of the trust period to allottees who were specifically named in the legislation. LaFave, *supra*, at 65-66.

The Burke Act deferred citizenship until the allottee received a fee patent. More importantly, the Burke Act delegated to the Secretary of the Interior the authority to issue fee patents to allottees prior to the expiration of the trust period. 25 U.S.C. § 349.

After passage of the Burke Act, the Secretary of the Interior issued fee patents to Indian allottees who applied for such patents and were deemed competent (usually on the recommendation of the local Indian superintendent). This policy of issuing fee patents only to allottees who applied for them continued until 1916. LaFave, *supra*, at 66-68; Cohen, *Handbook of Federal Indian Law* 136-137 (1982).

In 1916, Secretary of the Interior, Franklin K. Lane and Commissioner of Indian Affairs, Cato Sells, established a new policy. Officials of the Department of the Interior were assigned to "competency commissions" and directed to visit reservations and determine whether indi-

vidual Indian allottees were competent. Fee patents were issued to allottees found to be competent by these competency commissions regardless of whether the allottee applied for a patent.

On April 17, 1917, the Department of the Interior's policy regarding the issuance of fee patents to allottees was modified further by a document entitled "A Declaration of Policy" issued by Commissioner Sells and Secretary Lane. Under the terms of the declaration, competency commissions thenceforward were to investigate only allottees of one-half or more Indian blood. Allottees of less than one-half Indian blood were to be given their fee patents without investigation. The declaration provided:

To all able-bodied adult Indians of less than one-half Indian blood, there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home. Indian students, when they are 21 years of age or over, complete the full course of instruction in the government schools, receive diplomas and have demonstrated competency will be so declared.

LaFave, *supra*, at 68.

In 1919, the policy of presuming that allottees of less than one-half Indian blood were competent was extended to include allottees with one-half Indian blood. *Id.*

In 1921, the newly-elected Harding Administration ended the policy of issuing fee patents to Indians without application. Charles H. Burke, the former congressman

from South Dakota and author of the Burke Act, became the Commissioner of Indian Affairs. On April 1, 1921, he announced that an application and examination of competency would be required for all allottees who received fee simple patents after that date.

Mr. Burke claimed that his policy was consistent with the original intent of the Burke Act, and that the previous administration's policy had violated the drafter's intent:

Although for a few years prior to 1921 great numbers of patents were issued during the trust period without application by or consent of patentees, under an erroneous construction of the Act of 1906, the practice was discontinued, and the Office and the Department are endeavoring to remedy as far as possible conditions resulting from the unauthorized release of the property and to protect the interests of those [sic] whom patents were issued without warrant of law, and the lands are not beyond recovery.

LaFave, *supra*, at 69 (citing Letter from Commissioner Charles Burke to William Spotted Eagle (January 29, 1929)).

[Mr.] Burke also offered recipients of forced fees, upon application to the Indian Office, an opportunity to request Department of Justice assistance in protecting tax payments or recovering land where tax deeds had been issued. Burke also supported a test case arising out of Idaho involving two Coeur d' Alene Indians who refused a forced fee patent. In *United States v. Benewah County* [290 Fed. 628], the Court upheld cancellation (sic) of the patent and return of the land to trust status. The authority of the Secretary of the Interior to cancel forced fee patents, provided the land had not been encumbered or sold, was codified in the Cancellation Acts of 1927 and 1931. [25 U.S.C. § 352a and 25 U.S.C. § 352b].

LaFave, *supra*, at 69.

In 1934, Congress enacted the Indian Reorganization Act.<sup>6</sup> This Act "extended the trust period indefinitely, halted future allotments, restricted land sales, except to tribes, and attempted through various provisions to stabilize the tribal land base." *Id.* at 70.

## HISTORY OF PLAINTIFFS' ALLOTMENTS

### 1. Amelia Nichols (*Nichols v. Rysavy, et al*)

On April 27, 1909, Amelia Nichols, a mixed blood member of the Rosebud Sioux Tribe, was issued a trust patent for Allotment No. 593. She signed a receipt for this allotment on July 29, 1914. On April 17, 1917, the Commissioner of Indian Affairs established a new policy whereby all allottees of less than one-half Indian blood would be issued a fee patent, whether or not they desired one. As a result of this policy, Amelia Nichols was issued a fee patent for Allotment No. 593 on December 29, 1917 by the Secretary of the Interior without her prior consent. She signed a receipt for the fee patent on January 30, 1918. Allotment No. 593 was subsequently conveyed by warranty deed by Amelia Nichols to C.E. Plummer on October 12, 1918 and by mesne conveyance to Defendant James Rysavy on July 15, 1943.

### 2. James Wilde (*Potter v. State of South Dakota, et al*)

On January 12, 1911, James Wilde was issued a trust patent for Allotment No. 3759 on the Pine Ridge Reserva-

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6. Ch. 576, 48 Stat. 984 (Codified as amended at 25 U.S.C. §§ 461, 462, 463, 464, 465, 466-470, 471-473, 474, 475, 476-478, 479).

tion. No receipt was found for this trust patent. James Wilde, like Amelia Nichols, had less than one-half Indian blood and was issued a fee patent for the allotment on April 13, 1918, without his prior consent. Mr. Wilde signed a receipt for the fee patent.

Mr. Wilde transferred the property to Grace Wilde by warranty deed on June 30, 1919. At that time the property was subject to two mortgages to the State Bank of Interior. James and Grace Wilde then mortgaged the land to South Dakota Rural Credit Board on April 27, 1920.

On May 5, 1925, Grace Wilde, by warranty deed, transferred the real property back to James Wilde. On July 16, 1925, Mr. Wilde wrote to the Commissioner of Indian Affairs requesting the fee patent be cancelled. The requested cancellation was denied.

On April 9, 1928, the State of South Dakota was issued a sheriff's deed for the property pursuant to a mortgage foreclosure proceeding. On October 2, 1940, the State sold the property to Clyde Sharp for \$4,500 stated consideration. At that time the State reserved all mineral interests pursuant to state law. The surface ownership was thereafter transferred on several occasions.

3. John Yellow Bird (*Ecoffey v. Washabaugh County, et al*)

John Yellow Bird was issued a trust patent for Allotment No. 4202 on January 12, 1911. Like the other Plaintiffs' Decedents, Mr. Yellow Bird had less than one-half Indian blood and was issued a fee patent for the allotment on September 29, 1918, without his prior consent. Mr. Yellow Bird signed a receipt for the fee patent. Prior to

Yellow Bird's conveyance to William Munger by warranty deed on April 28, 1923, Washabaugh County levied taxes on the property in the amount of \$403.77. Thereafter, other conveyances were made until title to the property ended up with Betty Isenbraun on April 16, 1981.

### LEGAL ISSUES

The complexity of this case can best be expressed by the number of issues raised by the various motions to dismiss.

	<u>Nichols</u>	<u>Potter</u>	<u>Ecoffey</u>
1) Sovereign Immunity	X	X	X
2) Lack of subject matter jurisdiction	X		
3) Cancellation acts (25 U.S.C. §§ 352a and 352(b) are exclusive remedies	X	X	X
4) Plaintiff's decedent consented to issuance of patent	X		
5) Failure to join indispensable parties	X		
6) Laches/BFP/Equitable Estoppel	X	X	X
7) Action against SD barred by 11th Amendment		X	
8) Action against state pursuant to 42 U.S.C. § 1983 barred because state is not a person		X	
9) Statute of Limitations, 28 U.S.C. § 2401(a)	X	X	X
10) U.S. is an indispensable party which cannot be joined	X	X	X
11) Past and present owners are indispensable parties and cannot be joined		X	
12) Impermissible collateral attack on patent by a third party	X	X	X
13) Nonjustible (sic) political question		X	

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	<u>Nichols</u>	<u>Potter</u>	<u>Ecoifey</u>
14) Matter committed to agency discretion		X	X
15) Burke Act allows imposition of fee patents without application of allottee		X	X
16) 1917 rules of issuing fee patents without application to allottees of one-half Indian blood or less does not constitute denial of equal protection		X	
17) Failure to state claim—no constitutionally protected vested right to have an allotment held in trust for 25 years		X	X
18) State law bars claim	X	X	
19) Allottee consented to issuance of fee patent as a matter of law		X	X
20) 25 U.S.C. § 345 provides exclusive remedy	X		
21) Remedy of cancellation of fee patent not available	X		
22) Plaintiff lacks standing under 42 U.S.C. § 1983			X
23) Moot			X
24) 1917 rules which permitted issuance of fee patents without application are valid			X

However, due to the dispositive nature of this opinion, it was not necessary for this Court to discuss every issue.

## DECISION

### A. SOVEREIGN IMMUNITY

The first issue this Court must decide is whether the action against the United States is barred by the doctrine of sovereign immunity. It is well settled that the United



States may not be sued without its consent, and that only Congress can waive sovereign immunity. Wright, Miller and Cooper, *Federal Practice and Procedure* § 3654. "Moreover, if Congress in fact has consented to a particular kind of suit, it may define the conditions under which it is willing to be sued and the general rule long has been that the government's consent is to be strictly interpreted." *Id.*

The Plaintiffs, in their Complaint, make the following claim:

The consent of the United States to this action is . . . contained in 25 U.S.C. § 345 and 346. The United States has also consented to this action by officially notifying the heirs of [the Plaintiff] that it will not file this action as their trustee under 28 U.S.C. § 2415 and that they must file it on their own behalf.

25 U.S.C. § 345 provides that:

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper district court of the United States; and said district courts are given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of



any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases.

Section 345 is a limited consent by the United States to suit. *Scholder v. U.S.*, 428 F.2d 1123, 1126 (9th Cir. 1970). Although this statute does waive sovereign immunity for certain cases involving allotments, the claims presented by the Plaintiffs fall outside the scope of 25 U.S.C. § 345 because the present action is not an action for an allotment.

As stated in Cohen, jurisdiction under § 345

includes actions by Indians to quiet title or recover possession of previously granted allotments or portions thereof, and to adjudicate other rights connected with beneficial ownership of the allotment. The statute does not confer jurisdiction to challenge administrative policies of the Department of the Interior, or jurisdiction over actions by non-Indians. Nor does it apply to Indian lands other than allotments. The basic requisite for jurisdiction is an issue covering Indian ownership of all or a portion of an allotment under federal restrictions.

F. Cohen, *Handbook of Federal Indian Law* 314 (1982).

The U.S. Supreme Court, in *Affiliated Ute Citizens of Utah v. United States*, defined the word "allotment" in the following manner:

Allotment is a term of art in Indian law. (citation omitted). It means a selection of specific land awarded

to an individual allottee from a common holding. (citation omitted). Section 345 authorizes and provides governmental consent for only actions for allotments.

406 U.S. 128, 142, 92 S.Ct. 1456, 1466, 31 L.Ed.2d 741 (1972).

Cohen provides a more useful definition of an allotment stating that an allotment describes "either a parcel of land owned by the United States in trust for an Indian ('trust' allotment), or owned by an Indian subject to a restriction on alienation in favor of the United States or its officials ('restricted fee' allotment)." Cohen at 615-616.

In this action, the Plaintiffs' decedents were issued trust patents. The Plaintiffs then allege that the Secretary of the Interior erroneously issued a fee patent to the Plaintiffs' decedents. When they received their fee patents, the lands lost their status as trust lands. *Larkin v. Paugh*, 276 U.S. 431, 439, 48 S.Ct. 366, 388, 72 L.Ed. 640 (1928). Thus the land is no longer considered an allotment. The land was later either sold or foreclosed upon, this transferring ownership of the land from the Plaintiffs' decedent to another person. The Plaintiffs now seek to have the land taken from its current occupants and returned to trust status. Applying the two definitions of allotments to the current situation, it is clear that § 345 does not apply because the action does not involve an allotment, but deals with land held in fee by the present owners. Therefore, § 345 is not a waiver of sovereign immunity.

The Plaintiffs also claim that the United States gave its consent by officially notifying the heirs of [the Plaintiffs' decedents] that it will not file this action as their

trustee under 28 U.S.C. § 2415 and that they must file it on their own behalf.

This claim is without merit. 28 U.S.C. § 2415 is a statute of limitations. Nothing in § 2415 provides a waiver of sovereign immunity. In order for this Court to have jurisdiction, there must be an express statutory waiver of immunity. *Champaign-Urbana News v. J.L. Cummins*, 632 F.2d 680 (7th Cir.1980). Section 2415 does not provide this waiver. Therefore, the United States is dismissed as a party in all three actions.

#### B. STATUTE OF LIMITATIONS

Even assuming that 25 U.S.C. § 345 does provide a waiver of sovereign immunity, the Defendants allege that the action against the United States would be barred by 28 U.S.C. § 2401(a). Section 2401(a) does apply to actions brought under 25 U.S.C. § 345. *Christensen v. U.S.*, 755 F.2d 705 (9th Cir.1985). Section 2401(a) provides that

Except as provided by the Contract Disputes Act of 1978, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

However, if the patent is void, § 2401(a) would not apply to this action. See *Mottaz v. U.S.*, 753 F.2d 71 (8th Cir.1985).

A patent is void and inoperative if the government does not own the property, or has previously conveyed it, or if it is granted under a mistaken notion of the

law and without authority, or if the grant is directly contrary to the governing law, or if the land has previously been reserved, appropriated, or dedicated to uses which preclude its sale.

63A Am.Jur.2d Public Lands § 80.

The patent in this case was issued pursuant to the Burke Act of 1906, 25 U.S.C. § 349. This statute granted the discretionary authority to the Secretary of the Interior to issue fee patents to allottees he deemed competent and capable of handling his or her affairs. The Plaintiffs allege that the Burke Act never applied to tribes covered by the Act of March 2, 1889, and therefore, all of the fee patents are void. This argument is based on an analysis of other special allotment acts and rules of statutory construction. However, congressional intent indicates otherwise. The following exchange took place during the House debate of the Burke Act:

MR. FINLEY. Where are the Indians located who will be affected by this bill?

MR. BURKE of South Dakota. Mostly in the reservations of the country, if not entirely in the reservations.

MR. FINLEY. Within all the States and Territories? What Indians?

MR. BURKE of South Dakota. The *South Dakota Indians* probably more than others.

40 Cong.Rec. 3600 (March 9, 1906) (emphasis added). As stated in *National Woodwork Mfrs. Ass'n v. N.L.R.B.*, “[i]t is the sponsor we look to when the meaning of statutory words are in doubt.” 386 U.S. 612, 640, 87 S.Ct. 1250, 1266, 18 L.Ed.2d 357 (1967). Thus, it was the intent of Congress to have the Burke Act apply to South Dakota.

Therefore, because the patent was issued under the authority of 25 U.S.C. § 349, the patent is not void. Because more than six years have elapsed, this action is barred by 28 U.S.C. § 2401(a). Therefore, the United States will also be dismissed as a party in all three actions because of the statute of limitations contained in 28 U.S.C. § 2401(a).

### C. INDISPENSABLE PARTY

The next issue this Court must decide is whether the United States is an indispensable party. F.R.C.P. 19(b) provides for the dismissal of the entire action if the United States is regarded as an indispensable party.

Upon examining the factors set out in Rule 19(b), it is clear that the United States is an indispensable party. The Plaintiffs wish to have the land returned to trust status, eject the present occupants, and seek damages. If this is accomplished, the United States would not only have trust responsibility over the land, but could also be subject to claims by present owners and the other Defendants for any damages caused by the issuance of the patent. In addition, the United States is the party who issued the fee patent in question, thus setting the entire series of events in motion that resulted in the action.

Even if § 345 provided a waiver of sovereign immunity, the United States is an indispensable party in any action under § 345. *Antoine v. U.S.*, 637 F.2d 1177 (8th Cir. 1981). However, as stated in Section B, *supra*, § 2401(a) would bar the action against the United States, thus compelling the dismissal of the entire action. This Court cannot in good conscience let this action proceed without the United States as a party. Therefore, all three actions will be dismissed with prejudice as to all Defendants.

#### D. COLLATERAL ATTACK ON PATENT BY THIRD PARTY

The non-federal Defendants also argue that these cases should be dismissed because the Plaintiffs' complaints represent an impermissible collateral attack on a patent by a third party. In regard to a patent issued by the United States, the following well-established rules of law apply:

A patent to land, issued by the United States under authority of law, is the highest evidence of title, something upon which its holder can rely for peace and security in his possession. It is conclusive evidence of title against the United States and all the world, until cancelled or modified by an action brought for this purpose. 2 *The American Law of Mining*, § 1.29 at 357.

The issuance of the patent creates a presumption that all requisite steps and requirements of law and department regulations have been fully complied with. *Wright-Blodgett Co. v. United States*, 236 U.S. 397, 35 S.Ct. 339, 59 L.Ed. 637 (1915).

A leading treatise states: . . . a patent which is regular in form and for whose issuance there is statutory authority is so binding on the government that a purchaser from the patentee need make no investigation as to the details of its issuance—the legal title has passed and the patent is conclusive against the government. 2 *Patton on Land Title*, § 292, pages 26, 27.

*U.S. v. Eaton Shale Co.*, 433 F.Supp. 1256, 1267 (D.Colo. 1977).

The general rule is that "an attack on a patent generally may be made only in a direct proceeding by the government." 63 Am.Jur.2d Public Lands § 82. However, "a patent *regular on its face* and issued by the land depart-

ment within its authorized jurisdiction is conclusive and only subject to collateral attack on grounds that the patent is completely void." *Phelps Dodge v. State of Arizona*, 548 F.2d 1383, 1386 (9th Cir.1977) (emphasis added). As stated in Section B, *supra*, the patents were issued within the discretionary authority of the Secretary of the Interior and therefore, are not void. Thus, the Plaintiffs' complaints are impermissible collateral attacks on a patent by a third party. Therefore, all non-federal Defendants would be dismissed with prejudice for failure to state a claim even if the federal Defendants were not dismissed.

### CONCLUSION

This Court feels compelled to address certain issues, although not dispositive, that are directly related to the forced fee patent claims. "It has been estimated that 9,500 forced fee claims affecting 1.5 to two million acres could be brought in the western United States. . . ." LaFave at 61. Thus, these forced fee patent claims have far reaching social, economic, and political ramifications that were not fully considered when 28 U.S.C. § 2415 was amended. Title to millions of acres of land is clouded, thus affecting real estate transactions, probate proceedings, and credit availability. In other words, thousands of landowners are effectively barred from selling their land.

Another ramification involves the validity of a fee patent issued by the U.S. Government. If these fee patents can be successfully attacked, the entire United States title system is in jeopardy. Title insurance companies, who relied on the fee patent, would face financial ruin. "The return of the land to trust status would potentially result in a checkerboard effect on civil and criminal jurisdiction,



and would certainly remove the land from the tax base of the county and local school district.” LaFave at 96. If the land were returned to the Plaintiffs, the government would “hold in trust for the benefit of the allottee’s heirs, fractionalized shares in the original 160-acre allotment.” *Id.* This would be a hollow victory for the Plaintiffs.

Meanwhile, non-federal defendants, innocent of any possible wrongdoing, face ejectment and thousands of dollars in attorney’s fees. Although this case does not fit the criteria so as to be classified as a political question, the forced fee patent claims cry out for a legislative solution, and not a judicial solution.

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Shirley Lee BORDEAUX, Individually and as Special Administratrix of the Estate of Clara Hudson, No. 3196, Deceased

v.

Mary Ann HUNT, Estate of Lyle T. Hunt; Alvina Woockmann; the United States of America; Honorable James Watt, as United States Secretary of the Interior; Ken Smith, as Assistant Secretary of the Interior for Indian Affairs, Defendants.

Civ. No. 82-3081.

United States District Court,  
D. South Dakota, C.D.

Nov. 14, 1985.

DONALD J. PORTER, Chief Judge.

#### CASE SUMMARY

This case is one of thirteen filed in this court between December, 1982 and January, 1984, dealing with an identical issue: whether Indian land formerly held in trust for plaintiff's ancestor, but which had been unilaterally taken out of trust by the United States and subsequently alienated by plaintiff's ancestor approximately sixty years ago, should be recovered from its present possessors and returned to trust status for the benefit of the members of plaintiff's family.

The court, having been the recipient of extensive briefing by the parties and by amici, and having considered carefully the contentions of all involved, finds that the removal of the land from trust status, while regrettable, was nonetheless legal. Plaintiff therefore has no valid

claim for recovery of the land, and summary judgment must be entered for defendants.

### GENERAL FACTUAL BACKGROUND

The roots of this litigation lie in the General Allotment Act (Dawes Act) of February 8, 1887, Ch. 119, 24 Stat. 388 (codified as amended at 25 U.S.C. §§ 331-334, 339, 341, 342, 348, 349, 354 and 381). This Act provided that individual Indians should receive allotments, with title left in the United States in trust for the allottee for twenty-five years, during which time the allotment could not be sold, mortgaged, or taxed. Section 6 of this Act also provided that upon completion of the "allotments and the patenting of the lands to said allottees," the allottees would become citizens of the United States and subject to the laws of the state or territory in which they resided.

In South Dakota, the individual Indian reservations were created by the Act of March 2, 1889, Ch. 405, 25 Stat. 888. Individual allotments, very similar to those created under the Dawes Act, were authorized under Sections 8 through 11 of the 1889 Act. Section 11 also provided that "each and every allottee under this act shall be entitled to all the rights and privileges and be subject to all the provisions of section six of" the Dawes Act.

The United States Supreme Court, in *Matter of Heff*, 197 U.S. 488, 25 S.Ct. 506, 49 L.Ed. 848 (1905), construed Section 6 of the Dawes Act as conferring citizenship upon Indians upon the initial issuance of an allotment. Under *Heff*, this made the Indians subject to state laws, including those dealing with liquor sales. Congress, in the Burke Act of 1906, Ch. 2348, 34 Stat. 182 (codified at 25 U.S.C. § 349)

moved to amend Section 6 of the Dawes Act to defer citizenship until issuance of the fee patent. Congress also enacted, as part of the same Act, the language which is at the heart of the present controversy:

Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed. . . .

From 1906 to 1916, the Secretary of Interior implemented the Burke Act under a policy of granting fee patents to allottees who made application and were deemed competent, generally on the local Indian superintendent's recommendation. In 1916, the application requirement was withdrawn, and the Secretary began the issuance of patents after a government "competency commission" found individual Indians "competent." The requirements were loosened much further on April 17, 1917, with the promulgation of a document entitled "A Declaration of Policy":

To all able-bodied adult Indians of less than one-half Indian blood, there will be given as far as may be under the law full and complete control of all their property. Patents in fee shall be issued to all adult Indians of one-half or more Indian blood who may, after careful investigation, be found competent, provided, that where deemed advisable patents in fee shall be withheld for not to exceed 40 acres as a home. Indian students, when they are 21 years of age or over, complete the full course of instruction in the government schools, receive diplomas and have demonstrated competency will be so declared.

Office of Indian Affairs, Dept. of the Interior, *Report of the Commissioner of Indian Affairs*, 4 (October 16, 1917).

The presumption of competence was extended further in 1919 to include adult allottees of one-half Indian blood. Large numbers of "forced" fee patents were issued under these policies, involving many thousands of allottees in the western United States. Abuses were rampant: it is clear from the historical evidence cited in plaintiff's brief that many patents were issued to Indians obviously incapable of taking on the burdens of unrestricted property ownership in the midst of a more sophisticated white society. It is clear that some holders of these patents were cheated out of their land by speculators and merchants, and that some land was lost when the Indians sold or mortgaged it for money to pay state property taxes, taxes which could not be legally assessed under the rule of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912).

The forced fee patent policy was halted in 1921, and Congress eventually moved to provide some relief to the patent holders in the so-called Cancellation Acts of 1927 and 1931, 25 U.S.C. §§ 352a, 352b. These allowed the Secretary of the Interior, in certain circumstances, to return the patented land to trust status, so long as the land was not encumbered or sold. Less than 500 forced fee patents were "cancelled" under these statutes.

### SPECIFIC FACTUAL BACKGROUND

Plaintiff here is claiming under an allotment originally issued to Clara Hudson, a Rosebud Sioux Indian of one-half or less Indian blood. The trust patent was issued to her on April 27, 1909.

In response to the April 17, 1917, "Declaration of Policy," Assistant Commissioner E.B. Meritt provided the Secretary of the Interior, on October 16, 1917, with a list of Rosebud allottees of one-half or less Indian blood, including Clara Hudson, and noted:

As it appears from the record that all of the above named allottees [including Clara Hudson] have less than one-half Indian blood, it is respectfully recommended that the Commissioner of the General Land Office be requested to issue patents in fee to them for the lands set opposite their respective names and that the issuance of these patents be made special.

Assistant Secretary of the Interior S.G. Hopkins endorsed the proposal as follows:

I find from the evidence submitted that the allottees above named [including Clara Hudson] are qualified to care for their own affairs in a degree that entitles them to patents in fee covering the lands described above, and I, therefore, direct the Commissioner of the General Land Office to issue a patent in fee to them for the lands set opposite their respective names, and that the issuance of these patents be made special.

A fee patent was then issued in the name of Clara Hudson on December 29, 1917 for the subject land, although she evidently made no application for its issuance. The fee patent was delivered to her, and she signed a receipt for it on February 13, 1918.

Clara Hudson executed a mortgage covering the subject land on December 5, 1918, to W.H. Tackett. Consideration was listed as \$2,500. Clara Hudson then executed a warranty deed on July 8, 1919, covering the same land, to Fritz J. Huddin, acknowledging receipt of \$12,500 as con-

sideration. The grantee assumed the outstanding mortgage hereby.

## DISCUSSION

### I.

#### APPLICABILITY OF THE BURKE ACT TO SOUTH DAKOTA RESERVATIONS.

The argument has been advanced in this litigation that because the allotments in South Dakota were made under the 1889 Act, rather than the 1887 Dawes Act, the Burke Act, as an amendment to the Dawes Act, never applied to South Dakota. Thus, this argument proceeds, any issuance of a patent in South Dakota under the Burke Act was without authority and accordingly void. This argument is without merit.

Section 6 of the Dawes Act, the precise portion of that Act which was amended by the Burke Act, was incorporated in and made expressly applicable to South Dakota allotments by Section 11 of the 1889 Act.<sup>1</sup> As *Muenich v. United States*, 410 F.Supp. 944, 946 (N.D.Ind.1976) put it:

It is a basic rule of statutory construction that when one statute incorporates another by reference, an amendment to the incorporated statute operates as an amendment to the statute which incorporated the original act: "[W]hen a statute adopts the *general law* on a given subject, the reference is construed to mean that the law is as it reads thereafter at any given time including amendments subsequent to the time of adoption . . ."

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1. See the summary of these Acts cited in the General Factual Background, *supra*.



*See Sutherland Stat. Const.* § 51.07 (4th Ed.1984). (Emphasis supplied.) The foregoing rule does not apply to "limited and particular provisions", *see Sutherland, supra*, and plaintiff apparently contends that Section 6 of the Dawes Act is such a limited provision. Contrary to plaintiff's position, however, Section 6 of the Dawes Act, in setting forth the law as to the rights of all Indians "born within the territorial limits of the United States" and who had received allotments, was clearly intended by Congress to be the general law on its subject. As such, any later amendments to Section 6, including that made by the Burke Act, also became the general law on allottee rights, and as such, became incorporated in the 1889 Act and thus applicable to allotments in South Dakota.<sup>2</sup>

Further, even if it were doubtful whether the Burke Act applied to South Dakota allotments, all doubts would be resolved upon a consideration of the legislative history of the Burke Act. The Burke Act was proposed by, and received its name from, Representative Charles Burke, of South Dakota. The issue now before the court was raised during the debate of the Act:

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2. The principal cases cited in support of the contention that the Burke Act does not apply to South Dakota are *United States v. Nice*, 241 U.S. 591, 36 S.Ct. 696, 60 L.Ed. 1192 (1916) and *Seaples v. Card*, 246 F. 501 (E.D.Wash.1915). Neither are authority for this argument. *Nice*, which overruled *Matter of Heff, supra*, never addresses the Burke Act, and its silence can hardly be construed as a ruling on the applicability or inapplicability of the Burke Act in South Dakota. *Seaples* holds the Burke Act inapplicable to Indian *homesteads* granted under 1875 and 1884 Acts; these, unlike the 1889 Act creating South Dakota reservations, obviously did not incorporate the section of the Dawes Act dealing with *allotments* that was amended by the Burke Act.

Mr. FINLEY. Where are the Indians located who will be affected by this bill?

Mr. BURKE of South Dakota. Mostly in the reservations of the country, if not entirely in the reservations.

Mr. FINLEY. Within all the States and Territories? What Indians?

Mr. BURKE of South Dakota. The South Dakota Indians probably more than any others.

40 Cong.Rec. 3600 (March 9, 1906).

Plaintiff has offered no reason why the belief of the Burke Act's sponsor as to its applicability should have been incorrect, and the court perceives none. The Burke Act was clearly meant to, and in fact did, apply to allotments in South Dakota.

## II.

### NECESSITY OF AN APPLICATION FOR A PATENT UNDER THE BURKE ACT.

Plaintiff's next major contention is that the Burke Act contained a requirement for an application by the allottee before a fee patent could be issued, and that any patent issued in the absence of such application is necessarily void. The language of the Burke Act contains no such explicit requirement; indeed, in the context of another case, this court once observed that the codified version of the Burke Act, 25 U.S.C. § 349, was "one of a number of statutes enacted in the early portion of the twentieth century giving the Secretary unilateral power to either issue patents in fee to the Indian owners or to sell individual trust allotments to others." *Sampson v. Andrus*, 483 F.Supp. 240, 242 (D.S.D.1980). It is fundamental that

when a statute is phrased in plain language, a court need look no further than that language in the interpretation of the statute. *Caminetti v. United States*, 242 U.S. 470, 485, 37 S.Ct. 192, 194, 61 L.Ed. 442 (1917).<sup>3</sup> Given the clear absence of the words "upon application" from the Burke Act, the court should ordinarily conclude from that alone that no such requirement can be implied. Given the magnitude and persistence of plaintiff's claims, however, the court, in the interest of reaching a final disposition of this controversy, will proceed to consider the other arguments dealing with the issue of the application requirement.

First, the court has been provided with copies of the legislative history of the Burke Act. There is no explicit discussion of an application requirement in this history; what remarks that can possibly be construed as bearing on this issue are conflicting and unpersuasive. The strongest language in support of an application requirement is the following exchange:

MR. DIXON of Montana: Mr. Speaker, I want to ask the gentleman from South Dakota [Mr. Burke] if the purpose of the bill is not to prevent the blanket Indians by wholesale become citizens by allotments, and still allow the intelligent Indians *on application* to become citizens by allotments?

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3. As *American Bankers Insurance Co. of Fla. v. United States*, 265 F.Supp. 67, 73-74 (S.D.Fla. 1967), put it so well, it is

the duty of the Court to apply statutes on what Congress might have written . . . . Where the meaning of a statutory provision is clear, that language is the sole indication of legislative intent. Courts may not then resort to legislative history to aid in ascertaining Congressional intent. The statute, read with common sense, will be held to mean simply what it says and will be enforced as written.

MR. BURKE of South Dakota: That is the purpose of the law, and, further, to protect the Indians from the sale of liquor.

40 Cong.Rec. 3600 (daily ed. March 9, 1906). (Emphasis supplied). While the question it is true, does use the word application",<sup>4</sup> it does not say that an allottee may *only* get a fee patent by making application; it says merely that Indians are "allowed" to apply. Indeed, just a few months earlier in the debate, the following remarks were made:

MR. MONDELL: Now, under this legislation the Indian remains the ward of the Government for twenty-five years after he takes his allotment, unless in the meantime *the Secretary of the Interior sees fit to make him a citizen by granting him a patent in fee simple.*

\* \* \*

MR. CURTIS . . . . Now, this bill, if enacted, will leave [an allottee] under the control of the Government until he secures a patent conveying the fee, whether he gets it under an agreement or whether *it is issued to him* under the law by the Secretary of the Interior.

*Id.* at 3599. (Emphasis supplied). Although these statements certainly would not foreclose an application requirement in the Burke Act, the remarks, both in the absence of any reference to applications and in the very great discretion that seems to be attributed to the Secretary (particularly in Representative Mondell's "sees fit" language)

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4. The reference to "blanket" Indians becoming citizens "wholesale . . . by allotment" is of course an allusion to the ruling in *Heff*, which found that Indians became citizens as soon as the trust allotment was initially issued.

tend to imply that the Secretary would have sufficient power under the Burkē Act to issue patents without applications,<sup>5</sup> if that was the policy the Secretary chose to follow.

Further, although it is also not directly probative of the intent of Congress in the portion of the Burke Act at issue here, the court cannot overlook the Senate amendment added to the Burke Act, which provides, in pertinent part, that when an allottee died "before the expiration of the trust period, said allotment shall be cancelled . . . and the Secretary of the Interior . . . shall cause to be issued to [the] heirs . . . a patent in fee simple for said land." 40 Cong.Rec. 5805 (daily ed. April 25, 1906). While it may be true, as plaintiff contends, that the heirship problem was of a different nature than that dealt with by the rest of the Burke Act, it is yet significant that a clause giving the Secretary clearly unilateral power to terminate the trust period of an allotment was enacted with the rest of the Burke Act. Had Congress intended that the Secretary make such a crucial distinction between the two situations contemplated by the Burke Act, i.e., to require an application for a fee patent from living allottees while requiring no such applications from the heirs of deceased allottees, it would seem probable that Congress would it-

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5. An argument might be made that Representative Curtis' remarks, cited *supra*, in employing the reference to an allottee "securing" a patent, imply an application. The word is used, however, both in the context of the patent being issued by the terms of the "agreement"—treaty or statute—creating the allotment, i.e., by the eventual completion of the twenty-five year trust period, as well as action by the Secretary under the Burke Act. There is thus no logical reason to read "secure" as equivalent to "apply".

self have made this distinction explicit in its drafting of the Burke Act.

Plaintiff argues that the 1906 Burke Act must be interpreted in the light of a proposed 1905 measure which failed to gain passage:

That hereafter the Secretary of the Interior be, and he is hereby, authorized to issue a patent in fee simple to any adult mixed-blood Indian to whom a trust or other patent has been issued, containing restrictions upon alienation, and upon the issuance of such patent in fee simple all restrictions as to sale, incumbrance, or taxation of the land so patented are hereby removed. *Provided*, that such patent shall not be issued until *after the said Secretary has carefully considered the application and is fully satisfied that the applicant is competent to transact his own business, and that it will be for his best interest to have the patent issued.*

39 Cong.Rec. 1155 (daily ed. January 20, 1905) (Emphasis supplied). All the court perceives from this failed legislation was that Congress knew how to put application language into this type of bill when that was its intent. This is amply demonstrated by a number of other statutes that were enacted into law during the same time period as the Burke Act. The Act of July 1, 1902, 32 Stat. 636, for instance, provided that the Secretary, upon "request" of an adult member of the Kaw tribe, could remove the restrictions on alienation if he was satisfied the Indian was competent. The Act of April 21, 1904, 33 Stat. 189, 204, empowered the Secretary to remove the restrictions on alienation on land held by members of the Five Civilized Tribes "upon application" and after investigation of the allottee. The Act of June 14, 1906, 34 Stat. 262, 263,

passed shortly after the Burke Act, authorized the Secretary "upon application" to issue a fee patent to Indians with land allotted in drainage districts. The Act of June 21, 1906, 34 Stat. 325, 353 (the Clapp Amendment) unilaterally removed restrictions on land held by adult mixed-blood Indians within the White Earth Reservation in Minnesota, and allowed the Secretary, "upon application", to remove restrictions on land held by full-blood Indians when he found them competent. The Act of June 28, 1906, 34 Stat. 539, 542, authorized the Secretary, upon a finding of competency and "at the request and upon the petition" of an allottee, to issue a fee patent to an Osage Indian. Application language also appears in the Act of May 29, 1908, 35 Stat. 444, dealing with sale of allotted land, and the Act of June 25, 1910, 36 Stat. 855, 856, also dealing with the removal of restrictions on alienation.

On the other hand, several other statutes from the same time period dealing with the same subject contain no application language. The Act of June 21, 1906, 34 Stat. 325, 381, gave the Secretary the power to grant a fee patent to any Indian of the Oneida Reservation, making no reference to an application. No application language appears in the Act of May 27, 1908, 35 Stat. 312, allowing the Secretary to remove restrictions on land held by members of the Five Civilized Tribes. The Act of June 25, 1910, 36 Stat. 855 at 855-856 and the Act of February 14, 1913, 37 Stat. 678 (amending the 1910 Act), codified at 25 U.S.C. §§ 372, 373, also authorized the Sec-



retary to issue fee patents to heirs of deceased allottees, with no mention of an application requirement.<sup>6</sup>

It is true that the case of *United States v. Benewah County*, 290 F. 628, 631-32 (9th Cir.1923), seems to state that the existence of application language in two other contemporaneous statutes dealing with fee patents required the court to read "upon application" into the Burke Act.<sup>7</sup>

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6. It is also at least somewhat significant to note that Congress, at several times during this period, itself unilaterally removed restrictions on alienation. See the Clapp Amendment, cited *supra*; Act of June 21, 1906, 34 Stat. 325, 363; Act of May 27, 1908, 35 Stat. 312 (removing restrictions on basis of blood quantum of allottees of Five Civilized Tribes).
  7. The *Benewah County* court neglected to mention those contemporaneous statutes which also did not mention application language, and particularly did not mention the contemporaneous Amendment of Clapp of June 21, 1906, ch. 3504, 34 Stat. 325, 353, amended by Act of Mar. 1, 1907, ch. 2285, 34 Stat. 1015, 1034 which unilaterally removed all restrictions on allotments held by adult mixed-blood Indians in the White Earth Reservation in Minnesota, and which was upheld in *United States v. First National Bank*, 234 U.S. 245, 34 S.Ct. 846, 58 L.Ed. 1298 (1914). *First National Bank* stated, *inter alia*, that "the legislation here in question is not in the nature of contract, and contains no provision that makes it effectual only upon consent of the Indians whose rights and privileges are to be affected." 234 U.S. at 259, 34 S.Ct. at 850. This argues strongly against the general statutory requirement of application or consent for fee patents that *Benewah County* believed to exist.

Also, *Benewah County* makes the remark that the application requirement must be incorporated in the Burke Act "in light of the principles of law here involved", 290 F.2d at 631. This apparently alludes to the canon of construction, frequently urged by plaintiff, that provisions of Indian law are to be interpreted to give the maximum protection to Indian rights. But, as *Irving v. Clark*, 758 F.2d 1260, 1265 (8th Cir.1985), put it: "Highly malleable rules of statutory con-

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But the facts of *Benewah County* presented only the issue of whether land patented without application under the Burke Act retained its immunity from taxation. As will be discussed at Part III, *infra*, this is an issue entirely distinct from the issue of whether restrictions on alienation could be removed without application. Thus, any discussion by *Benewah County* of application requirements is not particularly applicable to the facts of this case. In any event, the *Benewah County* reasoning is contrary to the rule that a "change in the wording of a statute ordinarily imports a change of meaning unless a contrary intent plainly appears." *Altieri v. United States*, 295 F. Supp. 269 (Cust.Ct.1969) *see also Klein v. Republic Steel Corporation*, 435 F.2d 762, 765-66 (3rd Cir.1970): "where . . . the words of a later statute differ from those of a previous one on the same or a related subject, the legislature must have intended them to have a different meaning." While it is true that this rule is not "decisive, or even strong . . . [and must be applied] only . . . when we compare very similar statutes", *United Steelworkers of America v. Marshall*, 647 F.2d 1189, 1232 (D.C.Cir.1981), this rule is still "some evidence of congressional intent", *Id.* Given the striking similarity of the Burke Act to the other contemporaneous statutes cited *supra*, some of which do, and some of which do not, require applications for fee

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struction must have some limit, and the Supreme Court has also stated that "[l]egislation dealing with Indian affairs "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them,"'" citing *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666, 99 S.Ct. 2529, 2537, 61 L.Ed.2d 153 (1979).

patents, the court must consider these other statutes as an additional indication that Congress did not intend the Burke Act to require an application from the allottee.

It has also been argued in behalf of the plaintiffs in these cases that the Burke Act, read in the context of the Dawes Act which the Burke Act amended, necessarily supports plaintiff's position. In plaintiff's view, the main purpose of the Dawes Act in establishing the allotment system was to create an express twenty-five year trust to protect the allottees. Plaintiff contends an interpretation of the Burke Act to allow the issuance of patents without an application necessarily assumes that the Burke Act was an implied repeal of the supposed main purpose of the Dawes Act. Implied repeals are, of course, disfavored by law, and plaintiff urges that Congress would have been unlikely to enact such "a complete reversal" of the policy of the Dawes Act with so little discussion. While it certainly cannot be denied that *one* purpose of the Dawes Act was to provide some protection to the allottee during the trust period,<sup>8</sup> it must also be kept in mind that the Dawes Act, like other federal statutes during this period, was part of a

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8. The exact nature of this protection is less clear than plaintiff would have this court believe. *United States v. Mitchell* (I), 445 U.S. 535, 543, 100 S.Ct. 1349, 1354, 63 L.Ed.2d 607 (1980), described it as a "trust . . . of limited scope." On *Mitchell's* remand, the Court of Claims noted that the "purposes of the special trust provision of the General Allotment [Dawes] Act . . . did not include a true fiduciary or guardianship relationship toward the Indian-owners." *Mitchell v. United States*, 229 Ct.Cl. 1, 664 F.2d 265, 275 n. 18 (1981), *aff'd*, 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*).

policy of encouraging the assimilation of Indians into the white man's culture . . . . This policy was carried out by "allotting" to individual Indians sufficient resources to enable them to become independent farmers and ranchers . . . . As stated in[a] Senate Report [in 1907]:

The policy of allotting Indian lands in severalty, so as to break up the old tribal relations, has been going on for years. Ultimately, the Indian must become a citizen and work upon the new lines necessarily created by his present environments. He must learn to farm, to raise livestock, and to abandon the aboriginal methods of life. Large areas of Indian lands have already been thus allotted, and many of the tribes have become farmers and stock raisers.

*United States v. Overlie*, 730 F.2d 1159, 1162 (8th Cir. 1984). Certainly, it was but a continuation of this policy to its logical conclusion to grant the Secretary of the Interior the power to determine, in his discretion, whether some Indians had advanced so far under the allotment system that it was time for the United States to relinquish its control over the allotment, and thus reach the final stage in "assimilating" the Indian to white society.<sup>9</sup> The court can detect nothing in this policy and the part played in it by the Dawes Act, that would necessarily require an application by the allottee for a fee patent. Further, to the extent the Burke Act did constitute a departure from

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9. See *County of Thurston, State of Neb.*, 586 F.2d 1212, 1219 (8th Cir.1978): The Burke Act "and similar enactments of the period were intended to accelerate the assimilation of the Indians by truncating the length of the trust period and the benefits derived therefrom for Indians determined to be competent", citing the Clapp Amendment.

the Dawes Act, Congress was clearly aware of this change. The court's attention has been directed to Representative Burke's remark in the debate that his Act "is in accordance, in my opinion, with what the original allotment law contemplated, and what was considered to be the law until the decision of the Supreme Court last April held otherwise", 40 Cong.Rec. 3600 (daily ed. March 9, 1906), alluding to *Heff, supra*. This means only that Burke intended to clarify the language of the Dawes Act which *Heff* had construed as granting citizenship upon the issuance of the initial trust allotment. But Burke also knew he was changing the law as shown by an exchange earlier in the debate:

MR. CRUMPACKER. Under the law as it now stands, the Secretary of the Interior does not have authority to issue fee simple patents to Indians whom he may conclude are entitled to them?

MR. BURKE of South Dakota. That is true.

*Id.* at 3599.

Nor is plaintiff's position supported by the portions of the legislative history which discuss the necessity to relieve Congress of the burdens of special legislation to grant fee patents to individual allottees by vesting this power in the Secretary. This purpose of the Burke Act is made clear by the House Report, itself written by Burke, accompanying the Act:

In the opinion of this committee this provision is advisable, as it will make it unnecessary for legislation granting fee-simple patents to individual Indian allottees, as has been done in every session of Congress for several years, and it *places the responsibility upon the Secretary of the Interior and the Indian Department, who know best when an Indian has reached such*

*a stage of civilization as to be able and capable of managing his own affairs.*

H.R.Rep. 1558, 59th Cong., 1st Sess., Feb. 21, 1906 at 2. (Emphasis supplied). This aspect of the Burke Act was very attractive to members of Congress; in the first discussion of the Burke Act on the floor of the House, the following typical observations were made:

MR. LACEY: I would like to say, in this connection, that the proposition of having a general law is superior to the present method. Under a general law the Indian Department would release the Indian and give him a patent with full authority as provided by the law through these special acts. *Now, by giving this privilege always through a special act and by naming the party in an appropriation bill there is much more danger that some name will slip in without being duly considered than there would be if the matter were handled by general law, because between the two Houses an amendment could be inserted on the floor of the House adding this name or that name, with little or no consideration. That could not occur if the matter were provided for by general law instead of in this special way.*

40 Cong.Rec. 3552 (daily ed. March 8, 1906) (Emphasis supplied.) The difficulty with this material is that it really proves little beyond the fact Congress wished to pass one of its burdens onto the Secretary of the Interior, who was more closely concerned with Indian affairs. Notwithstanding plaintiff's arguments to the contrary, nothing in this history suggests that Congress felt the Secretary should follow any particular method in carrying out his new powers, or that Congress would have necessarily disagreed with a Secretarial policy of granting fee patents without application on the basis of age and blood quantum,

methods that Congress itself occasionally utilized.<sup>10</sup> See footnotes 6 and 7, *supra*, and the discussion of the Clapp Amendment in Part IV, *infra*. Congress did no more than determine that the Secretary was in the best position to decide when and how fee patents should be issued, and gave him the discretion to do so.

It is true that the Interior Department from 1906 to 1915, followed an administrative policy that, in effect, required applications for fee patents. It is argued that this supports plaintiff's position under the familiar rule that contemporaneous interpretation of a statute by the agency charged with its administration is evidence of the Congressional intent behind the statute, although plaintiff concedes that it is not "definitive" evidence. Yet, nothing in the letters and reports by Indian Commissioner Leupp and others in the years immediately following the passage of the Burke Act expressly state that the Act *mandates* applications or detailed investigations before the issuance of fee patents. Rather than any special awareness of Congressional intent, these materials merely reflect that, under the great discretion granted by the Burke Act, the Secretary at first chose to proceed with an application re-

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10. H.R.Rep. 1558, cited above, also contains a copy of a letter from Indian Commissioner Leupp, praising the Burke Act for its potential in reducing the number of "wards of the Government", and stating that the "bill makes it the duty of the Secretary . . . to satisfy himself of the civic competency of the allottee concerned. Through [his officers] the Secretary can make a thorough investigation of each case and take only such action as the facts may warrant." Significantly, even Leupp's remarks fall short of stating that no fee patent would be issued without an application, or that agents of the Secretary "must" investigate each case, using instead the more permissive verb "can."



quirement, just as the Secretary, after 1915, chose to dispense with the application procedure. Both methods seem to have been acceptable interpretations of the Burke Act, although the 1916-1921 interpretation actually appears closer to a strictly correct reading of the statute.<sup>11</sup>

Thus, the court can find nothing in the extensive material relating to the Burke Act and its historical circumstances that would lead the court to add the words "upon application" to the plain language of the Burke Act. If such a language is to be implied in the statute, it must come from a source other than the statute itself.

### III.

#### APPLICATION REQUIREMENT UNDER DUE PROCESS

Plaintiff argues that the allottee at issue in this case had a vested right under the Due Process Clause of the Fifth Amendment to the United States Constitution to have the restrictions on alienation kept on the allotment until the trust period ended by the expiration of the time

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11. Some further arguments are made about Representative Burke's participation in the enactment of the portion of the Act of June 25, 1910, 36 Stat. 855, dealing with the removal of restrictions on alienation on Indian lands other than allotments. Plaintiff points out that the law, as enacted, contained application language. The legislative history, at 45 Cong.Rec. 6081 (daily ed. May 11, 1910) however, discloses that the language originally proposed by Burke contained *no* application language, but was later added by a Senate-House committee which included Burke. This evidence is thus inconclusive at best.

Also, the 1923 statement by Burke that he had intended his 1906 Act to require applications is too far removed in time to be probative.

under the governing statutes, or the allottee applied for a fee patent. This issue was thoroughly explored by the courts in the first half of this century, and the weight of authority is firmly against plaintiff's position.

The source of the law on this issue is the venerable case of *Choate v. Trapp*, 224 U.S. 665, 32 S.Ct. 565, 56 L.Ed. 941 (1912). This considered whether the state of Oklahoma could levy property taxes on land allotted to Indians under an Act providing that the allotments would be restricted against alienation and exempt from taxes. In 1908, Congress enacted a statute which removed both the restrictions on alienation and the tax immunity of the land. The Supreme Court held that the tax immunity was a valuable property right, and as such was "protected from repeal by the provisions of the Fifth Amendment." *Choate, supra*, 224 U.S. at 678, 32 S.Ct. at 570. In so ruling, however, the Court expressly distinguished between the "right" of tax exemption and the restrictions on alienation:

the exemption and nonalienability were two separate and distinct subjects. One conferred a right and the other imposed a limitation . . . The right to remove the restriction was in pursuance of the power under which Congress could legislate as to the status of the ward and lengthen or shorten the period of disability. But the provision that the land should be non-taxable was a property right, which Congress undoubtedly had the power to grant.

224 U.S. at 673, 32 S.Ct. at 568.

Several years later, the issue was again placed before the Court in *Williams v. Johnson*, 239 U.S. 414, 36 S.Ct. 150, 60 L.Ed. 358 (1915). There, it was argued "that the

restriction upon alienation was a protection to [the allottee] 'against his own improvident acts', that it was 'not a personal privilege and repealable', but was 'an incident attached to the land itself', and 'was to him property as much as the land itself.' " 239 U.S. at 419, 36 S.Ct. at 151. Rejecting this contention, the Court did no more than repeat the language from *Choate* cited above, and state that "Congress has plenary control over tribal relations and property, and that this power continues after the Indians are made citizens, and may be exercised as to restrictions upon alienation." 239 U.S. at 420, 36 S.Ct. at 152.

Similar reasoning was used by the Supreme Court in several cases after *Choate* and *Williams*. *United States v. Nice*, 241 U.S. 591, 598, 36 S.Ct. 696, 60 L.Ed. 1192 (1916), for instance, remarked that

when the Indians are prepared to exercise the privileges and bear the burdens of one *sui juris*, the tribal relation may be dissolved and the national guardianship brought to an end; but it rests with Congress to determine when and how this shall be done, and whether the emancipation shall at first be complete or only partial.

Virtually identical language was used in *United States v. Waller*, 243 U.S. 452, 459-460, 37 S.Ct. 430, 431-32, 61 L.Ed. 843 (1917). *Jones v. Prairie Oil & Gas Co.*, 273 U.S. 195, 199, 47 S.Ct. 338, 339, 71 L.Ed. 602 (1927), took the issue to be so well settled that the court made the statement that it "is not open to dispute that the removal by the later act of Congress . . . of the restriction upon alienation previously imposed, is valid." In fact, in *Fink v. Board of County Commissioners*, 248 U.S. 399, 404, 39 S.Ct. 128, 130, 63

L.Ed. 324 (1919), the Court actually took the view that the removal of restrictions on alienation, far from constituting a taking of a property right, actually added to the value of the land:

We may here invoke the commonplace for it is commonplace to say that we only know the value of a thing by that which makes its worth. Under the restriction against the alienation the land had no worth but in its uses; the restriction removed, it had the added worth of exchangeability for other things,—a power of sale was conferred. To say there was no value in that power is to contradict the examples and estimations of the world.

The distinction between tax immunity and restrictions on alienation, and the differing power of Congress over the two aspects of trust allotments, has been generally observed by the lower courts. As *United States v. Benewah County*, 290 F. 628, 631 (9th Cir.1923), put it, there “can be no serious question of the authority of Congress to remove restrictions upon the alienation of the lands of allottees with or without the latter’s consent . . . But to remove restrictions upon alienation is a different thing from depriving Indian allottees of the immunity from taxation conferred upon them by their trust patents”.<sup>12</sup> Making much the same point are *United States v. Board of County Commissioners of McIntosh County*, 154 F.2d 600, 603

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12. As noted above, *Benewah County* proceeded to read application or consent language into the Burke Act, a reading followed in *United States v. Ferry County*, 24 F.Supp. 399, 401 (E.D.Wash.1938). The outcome in *Benewah County*, in its determination that tax immunity survived on allotments after patents, was dictated by *Choate*, and the finding that an application was required under the Burke Act was therefore unnecessary to the court’s ruling.

(10th Cir.1946) ("It is well settled that restrictions against alienation and exemption from taxation of lands owned by Indians are separate and distinct subjects, not dependent upon each other."); *United States v. Hester*, 137 F.2d 145, 147 (10th Cir.1943) ("restrictions against alienation and non-taxability are separate and distinct subjects."); *United States v. Spaeth*, 24 F.Supp. 465, 468 (D.Minn. 1938) ("That Congress had the authority to remove the restrictions upon the alienation of the lands of the allottees under the trust patents before the expiration of the twenty-five year period cannot be questioned . . . while it was necessary to obtain the Indian's consent to divest him of the guaranteed non-taxable land during the twenty-five year period, it was not necessary to obtain his consent to clothe him with authority to alienate his land."); *United States v. Ferry County*, 24 F.Supp. 399, 401 (E.D.Wash. 1938) ("The Congress may remove restrictions to alienation with or without the consent of the allottees . . . but such is a clear distinction from depriving the allottees, without their consent, of the vested right to hold land free from taxation for 25 years."); see also *United States v. Getzelman*, 89 F.2d 531, 536 (10th Cir.1937) ("The power of Congress to impose, extend, or reimpose restrictions on property of an Indian ward is plenary and not open to doubt."); *Johnson v. United States*, 283 F. 954, 955 (8th Cir.1922) ("The purview discloses plainly and clearly a legislative intention to remove restrictions under given conditions; and we find no difficulty in sustaining both. . . .").

It is true that *State v. Zay Zah*, 259 N.W.2d 580 (Minn. 1977), takes a different view of the law in this area. *Zay Zah* was another case involving the Clapp Amendment, see

footnotes 6 & 7, *supra*, and the discussion under Part IV, *infra*, and the involuntary removal of restrictions on allotments in the White Earth Reservation in Minnesota by Congress. Contrary to the cases just immediately cited, *Zay Zah* reasoned that because the land at issue had retained, under *Choate*, its immunity from taxation during the trust period, it had also retained *all* of its trust aspects. "The vested right to be free from state taxation must derive from somewhere, and its only possible source was the trust patent itself. After all, it is the land which is exempt from property tax, not the individual who happens to own or possess the land at any given time." 259 N.W.2d at 584. "If the Clapp Amendment was ineffective to destroy the tax exemption during this period, it must also have been ineffective to destroy the legal source of that exemption, namely, the trusteeship established by the patent." 259 N.W.2d at 586. If the trust relationship was still intact, then, by implication, the restrictions on alienation still stood.

Bluntly put, *Zay Zah* is clearly wrong. The heavy weight of authority, from *Choate* and all its federal progeny, virtually all of which was ignored by *Zay Zah*, is that there *is* a distinction between tax exemption and the other trust attributes of an allotment, particularly the restrictions on alienation. As the Eighth Circuit has recently put it, commenting directly on *Zay Zah*, extension of *Zay Zah's* reasoning beyond its facts, tax forfeiture of allotments, "may be erroneous in light of the long-standing distinction drawn by this Court and the United States Supreme Court that the Clapp Amendment was unconstitutional to the extent it attempted to end the tax exempt status of allotments so long as the trust status continued

... but constitutional to the extent it removed the restrictions on alienability of the allotment." *Spaeth v. United States Secretary of Interior*, 757 F.2d 937, 943 (8th Cir. 1985).

There can thus be no viable argument that, in designing the Burke Act to allow the Secretary to issue fee patents to Indians even in the absence of an application, Congress committed any constitutional violations. As the case law from *Choate* on down makes plain, restrictions on alienation are nothing more than a "limitation" on property, which may be removed whenever and in whatever method Congress may choose.<sup>13</sup>

#### IV.

#### COMPETENCY BY DETERMINATION OF AGE AND BLOOD QUANTUM

A second main thrust of plaintiff's case is that the Secretary could not permissibly make competency decisions under the Burke Act on the basis of age and blood quantum, and that all fee patents issued on the basis of such determinations are void. Plaintiff argues, initially, that the Burke Act requires what plaintiff calls an "individual" determination of competency. Precisely what is meant by "individual" is not clear. Certainly, there was an "individual" finding that each allottee met the age and blood standards. The language of the Act itself only

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13. Even if an application or consent requirement were to be found in the Burke Act or the Constitution, a substantial argument can be made, see Part V of this opinion, that the facts of this case demonstrate consent to the fee patent by the allottee involved.



states that the Secretary "may, in his discretion . . . whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs," issue a fee patent. This language itself does not purport to lay down any standards that the Secretary is bound to follow in making this competency determination. As the analysis of the legislative history earlier in this opinion demonstrated, the intent of Congress seems to have been no more than to turn the burden of deciding when to issue fee patents over to the Secretary, and to give him very broad discretion in deciding the proper time and procedure to follow in making his decisions.

Perhaps the strongest authority for plaintiff in this respect is *United States v. Debell*, 227 F. 760 (8th Cir. 1915), which was an attempt by the United States to cancel a fee patent issued under the Burke Act in 1908, *before* the promulgation of the blood quantum test at issue in this case. In *Debell*, there was strong evidence of fraud and collusion to induce the Secretary to believe an Indian was competent under the standards then used, so that a fee patent might be issued and the Indian's land could be bought at less than its value. In considering whether the Secretary's competency decision had been valid, the court stated that a competency test under the Burke Act should have particular attributes:

It is indispensable to that competency and capability to manage his affairs which conditions the right of the Secretary to issue a patent in fee simple to an Indian under the [Burke Act] that he shall have at least sufficient ability, knowledge, experience, and judgment to enable him to conduct the negotiations for the sale of his land and to care for, manage, invest, and dispose of its proceeds with such a reasonable de-

gree of prudence and wisdom as will be likely to prevent him from losing the benefit of his property or its proceeds.

227 F. at 770.<sup>14</sup> *Debell* found that if the Secretary followed any other test, "he committed [an] error of law." *Debell* also found that the Indian involved in the case was indeed "incompetent . . . and that the patent in fee simple and the deed to the [original purchaser] were evasive violations of the settled policy of the nation to preserve and protect incompetent Indians." *Id.* Yet, the court refused to cancel the patent and return the land to trust status because it had already been sold to an innocent third party, stating that the original conveyance was "voidable, but it was not void because the United States had issued to [the Indian] its patent in fee simple." 227 F. at 771. "The title of a bona fide purchaser of land subsequent to the issue of the patent is superior to the equitable claim of the United States [acting in behalf of the Indian] to avoid it for fraud

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14. See also *Ex Parte Pero*, 99 F.2d 28, 35 (7th Cir.1938), which stated that

under Section 349 it is obvious that the Secretary of the Interior in exercising his discretion to issue a patent in fee simple to a trust allottee ought to be satisfied not only that the allottee is competent and capable of managing his or her affairs, but also that it would be to the best interest of the allottee for the allottee to become emancipated from the exclusive jurisdiction of the United States and become subject to the laws of the state in which he resides.

This language is largely dicta, however, since no fee patent was actually issued in *Pero*, see 99 F.2d at 32, but instead involved was the issuance of a competency certificate under 25 U.S.C. § 372. In any event, *Pero*, which involved a question of state criminal jurisdiction, did consider the validity of a fee patent issued in violation of what the *Pero* court took to be the requirements under 25 U.S.C. § 349.

or error of law in the issue of it.” 227 F. at 763. (Emphasis supplied.) The point of *Debell*, and its significance for this case, is clear: whatever legal errors may have been made in a Secretarial competency decision under the Burke Act, even to the point of finding incompetent Indians competent, these errors do not rise to such a level as to render void the issuance of the patent, at least where, as here, the rights of innocent third party purchasers are involved. This conclusion is buttressed by *Mitchell v. United States*, 229 Ct.Cl. 1, 664 F.2d 265, 275 (1981), *aff’d*. 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983):

we deny entitlement to any recovery under 25 U.S.C. §§ 349 [the Burke Act], 377 . . . which deal with the issuance of fee patents to Indians found by Interior to be competent. Though the underlying land is held in a limited trust . . . this fee-patent legislation suggests little of the assumption of fiduciary responsibility . . . . The statutes seem almost purely regulatory, invoking Congress’s plenary power over Indians, and do not themselves mandate any compensation . . . for such alleged injuries as failing properly to determine whether or not an Indian was competent to obtain an allotment, or for issuing patents to incompetents despite the statute.

Regardless of the language in *Debell*, however, the court is of the view that the competency decision made by the Secretary in this case on the basis of age and blood quantum was within his legal authority. The central case on this issue is *United States v. Waller*, 243 U.S. 452, 37 S.Ct. 430, 61 L.Ed. 843 (1917), decided April 9, 1917, just a week before the promulgation of the “Declaration of Policy” by which the Secretary undertook his policy of determining competency by blood quantum. This was an action in which the United States was seeking to can-

cel deeds made by Indians on the White Earth Reservation in Minnesota after the passage of the Clapp Amendment, which removed all restrictions on allotments held by adult mixed-blood Indians. In affirming the dismissal of the action, the Court held:

This distinction between the qualifications of adult mixed and full-blood Indians is one which Congress has not infrequently applied. . . . [The Clapp Amendment] thus evidences a legislative judgment that adult mixed-blood Indians are, in the respects dealt with in the Act, capable of managing their own affairs, and for that reason they are given full power and authority to dispose of allotted lands. This may be a mistake of judgment as to some cases. . . . But Congress dealt with general conditions, and with these classes of Indians as a whole, and, with authority over the subject, has given to adult mixed-blood Indians the full right to dispose of the lands in question. It is not for the courts to question this legislative judgment.

243 U.S. at 462, 37 S.Ct. at 433. *See also United States v. First National Bank*, 234 U.S. 245, 259-260, 34 S.Ct. 846, 849-50, 58 L.Ed. 1298 (1914) (also upholding Clapp Amendment; disastrous after-effects of legislation "can have little weight in determining the meaning of the legislation, and certainly cannot overcome the meaning of plain words used in legislative enactments. Congress has in other legislation not hesitated to place full-blood Indians in one class and all others in another."); *Tiger v. Western Investment Co.*, 221 U.S. 286, 31 S.Ct. 578, 55 L.Ed. 738 (1911); *United States v. Spaeth*, 24 F.Supp. 465 (D. Minn.1938).<sup>15</sup>

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15. *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 97 S.Ct. 911, 51 L.Ed.2d 173 (1977) also upheld distinctions between tribal members.

Thus, plaintiff is asking this court to declare illegal a Secretarial policy upheld in several contemporaneous decisions by the United States Supreme Court. It is argued, of course, that the distinction between this case and those just cited is that here there is a policy promulgated by the Secretary of the Interior, while the policies in *Waller, supra*, *First National Bank, supra*, *Tiger, supra*, and *Spaeth, supra*, were enacted by Congress itself. It is much too late in the day for such a contention to carry any weight.

As the Supreme Court recently stated, when "Congress explicitly delegate[s] authority to construe the statute by regulation . . . we must give the regulations *legislative* and hence controlling weight unless they are arbitrary, capricious, or plainly contrary to the statute." *United States v. Morton*, 467 U.S. 822, —, 104 S.Ct. 2769, 2776, 81 L.Ed.2d 680, 691 (1984) (Emphasis supplied.) Or, as *Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 53 L.Ed.2d 448 (1977) put it: when Congress delegates to the Secretary the power to implement a statute,

Congress entrusts to the Secretary, rather than to the courts, the primary responsibility for interpreting the statutory term. In exercising that responsibility, the Secretary adopts regulations *with legislative effect*. A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.

(Emphasis supplied.) See also *United States v. Mersky*, 361 U.S. 431, 437-38, 80 S.Ct. 459, 463-64, 4 L.Ed.2d 423 (1960).

There can be no doubt that Congress had delegated to the Executive Branch the legislative power to promulgate

regulations to implement the Burke Act. The 1878 Revised Statutes contained the following provisions:

Sec. 441. The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

\* \* \*

Third. The Indians. . . .

Sec. 463. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs, and of all matters arising out of Indian relations.

Sec. 465. The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.<sup>16</sup>

The effect of these statutes was interpreted in *United States v. Thurston County*, 143 F. 287 (8th Cir.1906). At issue there was the sale of trust lands by heirs of the original allottees under a 1901 Act, which sale was allowed under regulations promulgated by the Secretary of the Interior which imposed a condition that the proceeds be deposited in a bank. Stating that the "acts of Congress authorized the Secretary to make those regulations for the purpose of carrying into effect the act of 1902, and, when made, *they had the force of statutory enactments*," 143 F.

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16. Clearly, this power to promulgate regulations could be and was delegated to the Secretary of the Interior and the Commissioner of Indian Affairs. See *United States v. Birdsall*, 233 U.S. 223, 34 S.Ct. 512, 58 L.Ed. 930 (1914).

at 291 (Emphasis supplied), the court cited Rev.St. §§ 441, 465.

Thus, when the Secretary promulgated his policies in 1917 and 1919 that adult mixed-blood allottees were presumptively competent within the meaning of the Burke Act, his rules took on the attributes of legislation, and carried the same weight as Congressional enactments. As such, this court can only set them aside if they were arbitrary, capricious, or plainly contrary to the Burke Act. This question does not long detain the court. As noted above, the blood quantum policy adopted by the Secretary was a virtual duplicate of that enacted in the Clapp Amendment, and specifically upheld by the Supreme Court, in *Waller, supra*. It is illogical for this court to find that, by incorporating standards used by Congress itself in determining whether Indians should be issued fee patents, the Secretary acted either arbitrarily or capriciously. Nor can the court find that this policy was plainly contrary to the Burke Act. The Burke Act did no more than to vest discretion in the Secretary to determine how and when fee patents should be issued. In promulgating the blood quantum method, the Secretary exercised his discretion, evidently guided by the wording of other statutes and Supreme Court case law of the time, to choose one such method. That this method appears, to modern eyes, ill chosen, and in fact resulted in disastrous consequences to many of the Indians involved, does not allow this court to find that it was contrary to the provisions of the Burke Act. The policy was as much a law as the Clapp Amendment, and just as *Waller* found the Clapp Amendment to be a legitimate exercise of federal power, so must this court uphold the blood quantum policy under the Burke Act.



The argument has also been advanced that the blood quantum policy violated the equal protection component of the Fifth Amendment to the United States Constitution. The court entertains severe doubts as to whether equal protection is relevant to this case, since prior to *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954), equal protection standards were repeatedly held to be inapplicable to actions by the federal government. See *Detroit Bank v. United States*, 317 U.S. 329, 63 S.Ct. 297, 87 L.Ed. 304 (1943); *Currin v. Wallace*, 306 U.S. 1, 59 S.Ct. 379, 83 L.Ed. 441 (1939); *Charles E. Steward Machine Co. v. Davis*, 301 U.S. 548, 57 S.Ct. 883, 81 L.Ed. 1279 (1937). If equal protection is to be applied here, however, the test is that set forth in *Morton v. Mancari*, 417 U.S. 535, 555, 94 S.Ct. 2474, 2485, 41 L.Ed.2d 290 (1974): "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." See also *Delaware Tribal Business Committee v. Weeks*, *supra*, 430 U.S. at 84-85, 97 S.Ct. at 918-19.<sup>17</sup>

*Morton v. Mancari* upheld Indian preference in Bureau of Indian Affairs employment under 25 U.S.C. § 472, which has been implemented by 25 C.F.R. § 5.1, stating, in part, that "a preference will be extended to persons of Indian descent who are . . . (c) . . . of one-half or more Indian blood." The *Mancari* court looked to the purpose of the preference, as evidenced by the legislative history, and found

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17. It is clear this test is applicable only "for judging the constitutionality of Indian legislation under the Due Process Clause of the Fifth Amendment"—not issues involving Congressional exercise of its power of guardianship. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 413 n. 28, 100 S.Ct. 2716, 2739-40, 65 L.Ed.2d 844 (1980).

it in the Congressional determination that "proper fulfillment of its trust required turning over to the Indians a greater control of their own destinies." 417 U.S. at 553, 94 S.Ct. at 2484.

This purpose is not much different, in many respects, than that which underlay the Burke Act. As noted before, see footnote 10, *supra*, the letter of Indian Commissioner Leupp attached to the House report on the Burke Act, stated:

There are many members of Indian tribes, full bloods, mixed bloods, and in some instances adopted white men, who are entirely competent to transact their own business and take their places in the ranks of our common citizenship. If such allottees are given full control of their property they will be absorbed into the community in which they reside and bear their share of burdens, while at the same time the number of 'wards of the Government' will be gradually reduced.

H.R. Rep. No. 1558, 59th Cong., 1st Sess., Feb. 21, 1906 at 4. This was entirely in agreement with the assimilationist views that dominated federal government policy at the time, see *United States v. Overlie*, 730 F.2d 1159, 1162 (8th Cir.1984), cited *supra*, and, to a considerable extent, the obligation recognized by the Supreme Court in *Mancari* "to prepare the Indians to take their place as independent, qualified members of the modern body politic", 417 U.S. at 552, 94 S.Ct. at 2483 citing *Board of County Commissioners v. Seber*, 318 U.S. 705, 715, 63 S.Ct. 920, 926, 87 L.Ed. 1094 (1943). Given these goals under federal Indian policy, this court cannot say that it was irrational, unwise though it may appear in retrospect, for the Secretary to determine that adult persons of one-half or less

Indian blood were no longer in need of federal controls over their land, and to grant them the same independent powers held by all other citizens of the United States. The decision appears at least as rational as the unquestionably legal, under *Mancari*, determination by the Secretary that merely because a person has one-half or more Indian blood, he is entitled to a preference in employment by the Bureau of Indian Affairs "to further the cause of Indian self-government". *Mancari*, 417 U.S. at 554, 94 S.Ct. at 2484. The court therefore finds itself unable to disturb, on equal protection grounds, the policy decisions made by the Secretary in 1917 and 1919.

## V.

#### CONSENT BY ACTIONS FOLLOWING ISSUANCE OF THE FEE PATENT.

The prior portions of this opinion set out the reasons which persuade this court to conclude that plaintiff has no valid cause of action for the issuance of a "forced fee" patent. Though the court does not rest its decision on this ground, the court is also convinced that the actions of the allottee under whom plaintiff claims do, in fact, evidence consent to the issuance of the patent, if such consent was necessary.

The sources for this post-issuance consent theory arise essentially from two separate sources: the so-called Cancellation Acts of 1927 and 1931, and case law dealing with payment of state taxes assessed on patented trust land in spite of the prohibition of such taxes under *Choate v. Trapp*, *supra*.

The 1927 Cancellation Act is codified at 25 U.S.C. § 352a:

The Secretary of the Interior is hereby authorized, in his discretion, to cancel any patent in fee simple issued to an Indian allottee or to his heirs before the end of the period of trust described in the original or trust patent issued to such allottee, or before the expiration of any extension of such period of trust by the President, where such patent in fee simple was issued without the consent or an application therefor by the allottee or by his heirs: *Provided*, That the patentee has not mortgaged or sold any part of the land described in such patent: *Provided also*, That upon cancellation of such patent in fee simple the land shall have the same status as though such fee patent had never been issued. (Feb. 26, 1927, c. 215, 44 Stat. 1247.)

The 1931 Cancellation Act is codified at 25 U.S.C. § 352b:

Where patents in fee have been issued for Indian allotments, during the trust period, without application by or consent of the patentees, and such patentees or Indian heirs have sold a part of the land included in the patents, or have mortgaged the lands or any part thereof and such mortgages have been satisfied, such lands remaining undisposed of and without incumbrance by the patentees, or Indian heirs, may be given a trust patent status and the Secretary of the Interior is, on application of the allottee or his or her Indian heirs, hereby authorized, in his discretion, to cancel patents in fee so far as they cover such unsold lands not encumbered by mortgage, and to cause new trust patents to be issued therefor, to the allottees or their Indian heirs, of the form and legal effect as provided by sections 348 and 349 of this title, such patents to be effective from the date of the original trust patents and the land shall be subject to any extensions of the trust made by the Executive order on other allotments of members of the same tribe, and such lands shall have the same status as though such fee patents had never been issued: *Provided*, That this section and

section 352a of this title shall not apply where any such lands have been sold for unpaid taxes assessed after the date of a mortgage or deed executed by the patentee or his heirs, or sold in execution of a judgment for debt incurred after date of such mortgage or deed, and the period of redemption has expired. (Feb. 26, 1927, c. 215, § 2, as added Feb. 21, 1931, c. 271, 46 Stat. 1205.)

As can be seen from the language of both statutes, the word "consent" is used apart from, and in contrast to, the word "application." The reason for this is given in the House Report accompanying the 1927 Act:

Placing a voluntary encumbrance upon or disposing of land so patented must in law be considered as an acceptance of the fee patent and a waiver of the tax-exempt privileges of a trust patent, but where forced-patent land has neither been encumbered nor sold by the patentee, such patent ought to be canceled on application made to the Secretary of the Interior.

H.R. Rep. No. 1896, 69th Cong., 2nd Sess. 2 (1927). The power of the Secretary to return patented land to trust status was expanded in 1931 to include land, parts of which had been sold, or which had been mortgaged but the mortgage satisfied. In the view of Congress, however, this type of land could not be dealt with by only a cancellation of the fee patent, but required the issuance of a new trust patent entirely, implying that the sale or encumbrance had put the land in a category different from that where no such sale or encumbrance had occurred. This seems consistent with the indications in the legislative history of the 1931 Act that Congress had not retreated from its 1927 view of the effect of sale encumbrance:

MR. WILLIAMSON: The land that has been patented and has either been encumbered or sold by the Indian can not be reached. Nothing can be done in those cases, because, if a man mortgages or if he deeds, that is an equivalent to an acceptance of the patent and, so far as that land is concerned, the Indian is without recourse.

74 Cong.Rec. 3413 (daily ed. January 28, 1931). See also H.R.Rep. No. 2269, 71st Cong., 3rd Sess. 3 (1931), and the discussions of legislative history of these Acts, in *United States v. Frisbee*, 165 F.Supp. 883, 888 n. 4 (D.Mont.1958); and *United States v. Glacier County*, 74 F.Supp. 745, 747-748 (D.Mont.1947).

The taxation cases relevant to this issue are best typified by *County of Mahnomen v. United States*, 319 U.S. 474, 63 S.Ct. 1254, 87 L.Ed. 1527 (1943), yet another consideration of the ramifications of the Clapp Amendment. *Mahnomen* was an action by the United States to recover property taxes collected from an allottee who received a fee patent. In spite of the effect of the Clapp Amendment, as upheld in *Waller, supra*, in removing trust restrictions, the Court observed that the land retained its tax exemption under *Choate*. In spite of *Choate*, however, the allottee could still consent to give up even the tax immunity: "[a]cceptance of *Choate v. Trapp* does not mean that an Indian, legislatively declared to be competent to handle his own affairs, cannot voluntarily decide to pay taxes for his own advantage and welfare." 319 U.S. at 477, 63 S.Ct. at 1256. Citing *Ward v. Love County*, 253 U.S. 17, 22, 40 S.Ct. 419, 421, 64 L.Ed. 751 (1922), the *Mahnomen* Court said that "the burden is upon one seeking recovery of the tax to establish that the payment was made invol-



untarily", *Id.*, and because there was no evidence of involuntary payment in the record, the Court found the government not entitled to a recovery of the taxes.

*Mahnomen's* ruling differs somewhat from a series of earlier Ninth and Tenth Circuit cases, which basically hold that tax payments carry too many attributes of compulsion to be taken as indicia of consent to the issuance of the fee patent. *Board of Commissioners of Jackson County v. United States*, 100 F.2d 929 (10th Cir.1938); *Glacier County, Mont. v. United States*, 99 F.2d 733 (9th Cir.1938); *United States v. Lewis County*, 95 F.2d 236 (9th Cir.1938); *United States v. Nez Perce County*, 95 F.2d 232 (9th Cir.1938); *Board of Commissioners of Caddo County v. United States*, 87 F.2d 55 (10th Cir.1936); *United States v. Board of Commissioners of Commanche County*, 6 F. Supp. 401 (W.D.Ok.1934). To the extent these cases and *Mahnomen* are inconsistent, *Mahnomen* of course controls; yet even these Ninth and Tenth Circuit cases recognize the possibility of post-issuance consent to the fee patent. While noting that the Indian involved had neither mortgaged nor sold any part of his patented land, the *Nez Perce County, supra*, court reversed the district court's denial of the government's recovery of the property taxes paid by the Indian, and remanded for a specific finding on the issue of consent. Similarly, the parties in *Caddo County, supra* assumed that "the voluntary acceptance of a fee patent during the trust period operates to end the immunity", 87 F.2d at 56. The district court there, however, resolved the conflicting evidence to find there had been no consent. While recognizing that the fact that the allottee signed the receipt for the patent, her husband recorded the patent, and two mineral leases on the land were executed were



“facts and circumstances which argue persuasively that the patent was accepted”, 87 F.2d at 57, the court took the view that this was outweighed by the allottee’s testimony that she did not want the patent, and that the taxes on the land were paid under protest.

Other case law also supports the proposition that actions by the Indian involved can manifest consent. *See, e.g., Mottaz v. United States*, 753 F.2d 71, 75 (8th Cir.1985) (sale of fractional allotments on petition by some, but not all, owners: if non-petitioning owner “received payment for the land in 1955, then, on the facts of this case, we believe it may be assumed that she consented to the sale and thus that she does not have a cause of action.”); *Taylor v. Hearne*, 637 F.2d 689, 691 (9th Cir.) *cert. den.*, 454 U.S. 851, 102 S.Ct. 291, 70 L.Ed.2d 141 (1981) (“He recorded his title to parcel 24 one day after the government transferred it to him. Furthermore, he transferred his interest in the parcel to the Marquets in 1974, behavior that is inconsistent with any intention to reject the distribution.”); *United States v. Benewah County*, 290 F. 628 (9th Cir. 1923); *Morrow v. United States*, 243 F. 854, 855 (8th Cir. 1917) (the court stated the issue as whether land patented under the Clapp Amendment was “subject to state and local taxation, where the allottee has never attempted to avail himself of any power he might have under that amendment to alienate or incumber.”)

It is clear, then, that “[c]onsent depends on the facts and circumstances appearing in evidence in the particular case . . . While a mortgage or deed conveying a portion of the land does not in itself establish consent, it may constitute evidence that the patent had previously been ac-

cepted." *United States v. Frisbee*, 165 F.Supp. 883, 889 (D.Mont.1958). Indeed, sale or mortgage of even part of the patented allotment must be considered as strong evidence of consent to the patent. *United States v. Glacier County*, 74 F.Supp. 745, 748 (D.Mont.1947), explains it well, discussing an attempt by the United States to cancel the unsold portion of a fee patent:

[the allottee] conveyed the land by warranty deed which she could not have done without accepting and consenting to the patent as an indispensable basis of her act for such conveyance. In other words, she warranted the title and said by her warranty that she had good title to the land and a legal right to convey it. . . .

If she did not apply for the patent or consent to its issuance, how could she convey part of the land by warranty deed and consent to the patent to that extent and repudiate the patent as to the remainder of the land; the inconsistency is so great that the court will not attempt to solve it, and counsel for the Government have not done so, nor have they cited any authority in point to sustain their position. Mrs. Hall either consented to the issuance of the patent or she did not do so—the patent is an indivisible entity and can not be held good as to part of the tract of land conveyed and bad as to the remainder; it conveyed to Mrs. Hall her allotment in fee simple consisting of 320 acres.

*Frisbee*, *supra*, followed *Glacier County's* reasoning. *Frisbee* involved an action by the United States to recover 40 acres of a former allotment patented under the Burke Act which had been taken under a tax deed. The *Frisbee* court observed that the allottee had signed a receipt for the patent, recorded it a month later, and then executed mortgages for parts of the land other than the 40 acres later taken for taxes. Taxes were paid by someone on the 40

acres for one year. The allottee testified she did not want the patent, and had thought that she did not have to pay taxes on the land. The *Frisbee* court found the facts before it indistinguishable from those in *Glacier County*, and ruled that the allottee "must be held to have consented to the issuance of the fee patent." *Frisbee, supra*, 165 F.Supp. at 891.

Plaintiff contends that *Frisbee* and *Glacier County* are inapplicable here, apparently because of the court's patronizing discussion in *Glacier County* at 74 F.Supp. 748 comparing the allottee's appearance and intelligence to that of an intelligent white person. Plaintiff points out, correctly, that no such evidence is present in this record, but this court finds this factor insufficient to defeat the principles followed in *Glacier County* and *Frisbee*. Competency does not seem to have been actually considered as a pertinent issue by the court in either case,<sup>18</sup> and in *Frisbee*, after an implied attack on the sophistication of the allottee, the court did no more than to state that the Indian involved "gave the impression of being of at least average intelligence." 165 F.Supp. at 890.

Further, while it cannot be denied that it would be useful to have more evidence of the circumstances under which the allotment at issue here left the possession of its

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18. This may well have been because, as this court noted in its discussion of *United States v. Debell, supra*, errors made in determinations of competency do not render void the issuance of fee patents under the Burke Act. In any event, the allottee here was found, under legislative rules issued by the Secretary, see Part IV, *supra*, to be competent, just as the allottee in *Mahnomen* was legislatively found competent.

allottee-owner, the court is not convinced by plaintiff's argument that defendants have failed to put forward sufficient evidence of consent. Plaintiff contends that a heavy burden of proof must be cast on defendants on this issue, citing cases on waiver of constitutional rights, including *Rau v. Cavanaugh*, 500 F.Supp. 204, 207 (D.S.D.1980). It is not entirely clear that this doctrine is applicable to this issue, particularly in light of the implication in *Mahnomen, supra*, that the burden is on the person seeking to establish the continued existence of trust status to show the invalidity of the fee patent. In any event, plaintiff has cited no authority why this case should not be governed by the normal operation of Federal Rule of Civil Procedure 56(e):

When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

Here, defendants, as part of their motions for summary judgment, have shown that plaintiff's allottee parted with his land for a consideration under either a deed of sale or a mortgage. This has been recognized as particularly persuasive evidence of consent to the fee patent by Congress itself in the legislative history to the Cancellation Acts, and by numerous cases cited in this portion of this opinion. Under Rule 56(e), plaintiff was obligated to produce "specific facts" showing why there was still an issue for trial. Plaintiff did not do so; plaintiff has

instead cited the court to incidents reported in the 1920's of Indians whose land was taxed in spite of *Choate*, and who either sold their land to avoid its being taken, or mortgaged it to pay the taxes. Also, the court has been shown instances in which allottees lost their land to unscrupulous merchants and speculators. Even an unquestioning acceptance of the truth of these reports, however, does nothing to show what actually happened in *this* case. All the court has before it is the conveyance of the land under a sale or mortgage by the allottee. In the absence of any other evidence, and given the legal precedent on the effect of a sale or mortgage, this court must conclude that the allottee here consented to the issuance of the fee patent. Plaintiff therefore has no claim under that allottee for the recovery of the land in question, and the court, were it to rest its decision on this ground, would have no hesitation in entering summary judgment for defendants for this reason as well.

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## CONCLUSION

Before leaving this dispute, the court must join in the sentiments of the Western Division of this court in *Nichols v. Rysavy*, 610 F.Supp. 1245 at 1254 (D.S.D.1985): "the forced fee patent claims cry out for a legislative solution."<sup>19</sup> While this court has found there to be no judicial merit to plaintiff's claims, the claims may well represent a "mor-

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19. *Nichols* dismissed claims identical to those presented here, although on different grounds. This court also bases its decision today on the reasoning of *Nichols* as an additional bases for its holding.

al'' debt owed by the United States to the estates of Indian allottees injured by the forced fee patent policy described in this opinion.

Whether claims such as this shall become eligible for monetary compensation from public funds must depend upon whether Congress sees fit to establish an appropriate forum in which redress may be obtained. For the reasons given in this opinion, however, plaintiff's claims in this court in this action must be and are denied.

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